

CENTS AND SENSIBILITIES

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ABSTRACT

The religious nature of “In God we trust” is clear from the text and its history. The Baptist minister who first proposed a religious motto suggested “the recognition of the Almighty God in some form in our coins” would “relieve us from the ignominy of heathenism.” Both a McCarthy-era expansion and proposed diminutions under Theodore Roosevelt and George W. Bush confirm the religious nature of the motto.

Courts have sought a secular legislative purpose for “In God we trust,” suggesting it formalizes our medium of exchange, fosters patriotism, expresses confidence in the future, encourages recognition of what is worthy, and celebrates our religious heritage. Such post hoc secular rationales are unsupported by the historical record.

When first proposed, it was said the religious motto “would make a beautiful coin, to which no possible citizen could object.” But America has become a strikingly diverse society on matters of religious belief. Almost a third of our citizens profess non-Christian faiths or identify as atheists, agnostics, or nothing in particular. The religious motto is disrespectful of them.

To test the secular legislative purposes identified by the courts, the article concludes by proposing that “In God we trust” be replaced on some coins with mottos which truly reflect our diverse religious heritage.

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I wish as well as every body else to be perfectly happy, but like every body else it must be in my own way.

—Jane Austen, *Sense and Sensibility*¹

INTRODUCTION

Many Americans would no doubt be surprised to learn that we have a national march, tree, and flower.² Federal law proclaims *The Stars and Stripes*

¹ JANE AUSTEN, *SENSE AND SENSIBILITY* 135 (Patricia Meyer Spacks ed., Harvard Univ. Press 2013) (1811).

² 36 U.S.C. §§ 301–05 (2012) (designating, respectively, our national anthem, motto, floral emblem, march, and tree).

Forever our national march,³ the oak our national tree,⁴ and the rose our “national floral emblem.”⁵ Apart from questions about the reasoning behind such designations,⁶ the statutory choices seem not terribly controversial.⁷

Not so the statutory designation of “In God we trust” as our national motto.⁸ For our national motto is both ubiquitous and increasingly divisive. It is ubiquitous because it has appeared on American coins since 1864,⁹ and since 1955 has been required by statute to be emblazoned on every bill and coin.¹⁰ In Fiscal Year 2015 alone, the United States produced in excess of twenty-three billion circulating notes and coins, every one of which affirmed *In God we trust*.¹¹ It is increasingly divisive because, although its sentiment was once perhaps nearly uniformly held among our citizens, it is no longer. A significant and growing number of Americans do not place their trust in God, or place their trust in a god, or gods, other than the Christian God of the national motto.

The following discussion considers both the constitutionality and the wisdom of having *In God we trust* on our currency. We trace the history of having

3 36 U.S.C. § 304 (2012) (providing that “[t]he composition by John Philip Sousa entitled ‘The Stars and Stripes Forever’ is the national march”). The national *march* is not to be confused with the national *anthem*, which the same chapter designates as the *Star-Spangled Banner*. 36 U.S.C. § 301 (2012).

4 36 U.S.C. § 305 (2012) (providing that “[t]he tree genus *Quercus*, commonly known as the oak tree, is the national tree”).

5 36 U.S.C. § 303 (2012) (providing that “[t]he flower commonly known as the rose is the national floral emblem”).

6 The designations leave some questions unanswered. Is the Union really made more perfect by having a national tree? Why do we have a national floral emblem and not a national bird, a national march but not a national polka?

7 Although Glenn Miller’s swing classic *St. Louis Blues March* would be a much better national march. See MsCatreona, *Glenn Miller and the Army Air Corps Orchestra: “The St. Louis Blues March,”* YOUTUBE (July 10, 2013), <https://www.youtube.com/watch?v=dmbflslh-js>.

8 36 U.S.C. § 302 (2012) (providing that “‘In God we trust’ is the national motto”).

9 U.S. DEP’T OF THE TREASURY, REPORT OF THE DIRECTOR OF THE MINT, 1896 SEC’Y OF THE TREASURY ANN. REP. ON THE STATE OF THE FINANCES app. at 260–61 (1897), https://fraser.stlouisfed.org/files/docs/publications/treasar/AR_TREASURY_1896.pdf [hereinafter 1896 REPORT] (explaining that “the first suggestion of the recognition of the Deity on the coins of the United States was contained in a letter” from a Pennsylvania minister to Secretary of the Treasury Salmon P. Chase in 1861, and the suggestion was put into effect in 1864 “with the motto ‘In God we trust’”); *History of “In God We Trust,”* U.S. DEP’T OF THE TREASURY, <http://www.treasury.gov/about/education/pages/in-god-we-trust.aspx>. The text of the minister’s letter mentioned in these accounts is reproduced in Appendix A.

10 Act of July 11, 1955, Pub. L. No. 84-140, 69 Stat. 290 (codified as amended at 31 U.S.C. § 5114 (2012)) (providing that “all United States currency shall bear the inscription ‘In God We Trust’”).

11 In Fiscal Year (“FY”) 2015, the United States Mint produced 16.2 billion circulating coins. Matthew Rhett Jeppson, *Principal Deputy Director’s Letter*, 2015 U.S. MINT ANN. REP. 1, 1, <https://www.usmint.gov/wordpress/wp-content/uploads/2016/06/2015AnnualReport.pdf>. In FY 2015, the Bureau of Engraving and Printing produced over seven billion regular notes. U.S. Department of the Treasury, Bureau of Engraving and Printing, *Monthly Production Reports*, MONEY FACTOR, <https://www.moneyfactory.gov/resources/productionannual.html> (last visited Oct. 15, 2017) (reporting that 7,033,400,000 bills were printed in FY 2015).

the motto on our currency, then the constitutionality of the practice. We then briefly review modern changes in the religious affiliations of Americans, and consider two reform options that would make the composition of our currency both constitutional and respectful of all our citizens. One would chart a new direction for our currency that would implement the religious heritage rationale of the courts in a way that truly reflects the history and diversity of the nation on matters religious. The other would eliminate the problem. We close by discussing how having *In God we trust* on our currency is part of a broader question of how we should respond to our growing religious diversity.

I. “THIS WOULD RELIEVE US FROM THE IGNOMINY OF HEATHENISM”:
THE HISTORY OF *IN GOD WE TRUST* ON OUR CURRENCY

In this Part, we look at four episodes during which the placement of *In God we trust* on our currency was at issue: the original decision during the Rebellion to place the motto on some coins, the First Omission when the motto was removed from some coins during the administration of Theodore Roosevelt, the expansion of the motto on our currency during the McCarthy era, and the Second Omission when the motto was diminished on some coins and mistakenly omitted from others during the administration of George W. Bush.

A. *Origins During the Rebellion*

During the first year of the Rebellion, shortly after the Union defeat at the Battle of Ball’s Bluff, a Baptist minister from Pennsylvania, Reverend Mark R. Watkinson, wrote Treasury Secretary Salmon P. Chase to suggest “the recognition of the Almighty God in some form in our coins.”¹² He explained the rationale for his request: “You are probably a Christian. What if our Republic were now shattered beyond reconstruction? Would not the antiquaries of succeeding centuries rightly reason from our past that we were a heathen nation?”¹³ Having suggested a coin design with the motto “God, liberty, law,” Reverend Watkinson concluded:

This would make a beautiful coin, to which no possible citizen could object. This would relieve us from the ignominy of heathenism. This would place us openly under the Divine protection we have personally claimed. From my heart I have felt our national shame in disowning God as not the least of our present national disasters.¹⁴

Secretary Chase acted upon Reverend Watkinson’s suggestion regarding the recognition of God. The Secretary wrote James Pollock, the Director of the

¹² 1896 REPORT, *supra* note 9, at 260.

¹³ *Id.*

¹⁴ *Id.* at 260–61.

Mint, affirming his belief that “[n]o nation can be strong except in the strength of God, or safe except in His defense,” and his conclusion that “[t]he trust of our people in God should be declared on our national coins.”¹⁵ He ordered the Director of the Mint to implement Reverend Watkinson’s suggestion: “You will cause a device to be prepared without unnecessary delay with a motto expressing in the fewest and tersest words possible this national recognition.”¹⁶

Secretary Chase’s directive could not have gone to a more cooperative individual. Prior to being named the director of the Philadelphia Mint, James Pollock served as a judge, a member of Congress, and Governor of Pennsylvania. A religious man, he served for thirty-five years as the vice president of the American Sunday-School Union.¹⁷ He was described as “an exemplary Christian worker”; reference was made to “[h]is sterling integrity and Christian patriotism.”¹⁸ Of him it was said: “He was always eager to do the Lord’s business, with earnestness and dispatch”¹⁹ Pollock believed in a national Christianity, as described in a speech he delivered in 1855:

Citizens of America: Have you ever stopped to think where you are, what you have been, and what is your destiny? There is a national Christianity, . . . an American conscience, a great American heart; that heart, that conscience must be touched, must be enlightened with the glorious truths of the Bible ere they can feel and realize and know the responsibilities they owe to their country²⁰

Pollock’s brand of national Christianity led him to membership in the National Reform Association.²¹ During the Rebellion the National Reform Association brought together Christian citizens of a certain orientation, whose goal was to amend the Constitution to acknowledge God’s divine authority. Their proposed amendment would have changed the Preamble to read:

We, the People of the United States [*recognizing the being and attributes of Almighty God, the Divine Authority of the Holy Scriptures, the law of God as paramount rule, and Jesus, the Messiah, the Savior and Lord of all*], in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the general welfare, and secure the blessings of liberty to ourselves and to our posterity, do ordain and establish this Constitution for the United States of America.²²

¹⁵ *Id.* at 261. Reproduced at Appendix B.

¹⁶ *Id.*

¹⁷ EDWIN WILBUR RICE, *THE SUNDAY-SCHOOL MOVEMENT AND THE AMERICAN SUNDAY-SCHOOL UNION* 177 (1917).

¹⁸ *Id.* at 177–78.

¹⁹ *Id.* at 179.

²⁰ *Id.* at 178.

²¹ Martin Gruberg, *In God We Trust*, in *THE ENCYCLOPEDIA OF CIVIL LIBERTIES IN AMERICA* 486, 487 (David Schultz & John R. Vile eds., Routledge 2015) (2005).

²² Gary DeMar, *The National Reform Association*, *AM. VISION* (Sept. 16, 2009) (alteration in original), <https://americanvision.org/3026/the-national-reform-association/> (bracketing and italicizing proposed additions).

The Association intended that its constitutional amendment set a uniform national religion. One proponent made the analogy that as “Constitutional laws punish for false money, weights and measures, and of course Congress establishes a standard for money, weights and measures, so Congress must establish a standard of religion.”²³ The constitutional amendment proposed by the Association was intended to exclude non-believers, with one advocate asserting that “the existence of a Christian Constitution would disfranchise every logically consistent infidel.”²⁴

Having received the Secretary’s instructions as to the recognition of God on the nation’s coins, Director Pollock “carried out [Chase’s] directive without delay”²⁵:

[H]e arranged for the striking of pattern half dollars and eagles (\$10 gold pieces) bearing that date. . . . The pattern half dollars were identical in design to the Liberty Seated halves then being issued for commerce—except for the addition of the motto “God Our Trust” above the eagle on the reverse. . . . The pattern \$10 coins . . . had the same Liberty Head design as regular \$10 gold pieces of that time, but the words “God Our Trust” appeared in the field above the eagle on the reverse.²⁶

The process continued: “In December, 1863, the Director of the Mint submitted to the Secretary of the Treasury for approval designs for new 1, 2, and 3 cent pieces, on which it was proposed that one of the following mottoes should appear: ‘Our country; our God;’ ‘God, our Trust.’”²⁷

Secretary Chase responded by letter to Director Pollock on December 9, 1863, approving the suggested language with changes: “I approve your mottoes, only suggesting that on that with the Washington obverse the motto should begin with the word ‘Our,’ so as to read: ‘Our God and our country.’ And on that with the shield, it should be changed so as to read: ‘In God we trust.’”²⁸

²³ LEO PFEFFER, CHURCH, STATE, AND FREEDOM 241 (rev. ed., 1967) (1953).

²⁴ *Id.* As Pfeffer chronicles it:

The historian of the National Reform Movement suggested that if the Christian amendment were adopted, those who “do not see fit to fall in with the majority . . . must abide the consequences, or seek some more congenial clime.” But another man of God was somewhat less subtle in indicating the shortest way with dissenters. If, he said, “the opponents of the Bible do not like our government and its Christian features, let them go to some wild, desolate land, and in the name of the devil, and for the sake of the devil, subdue it, and set up a government of their own on infidel and atheistic ideas; and if they can stand it, stay there till they die.”

Id. at 241–42.

²⁵ Mike Fuljenz, “*In God We Trust*”—*The Story of Our National Motto*, SETINVESTIGATES.COM (Dec. 31, 2012, 12:00 AM) <http://setinvestigates.com/in-god-we-trust-the-story-of-our-national-motto-p338-111.htm>.

²⁶ *Id.*

²⁷ 1896 REPORT, *supra* note 9, at 261.

²⁸ *Id.*

The necessary legislation passed Congress on April 22, 1864, and the 2-cent bronze coin became the first upon which *In God we trust* appeared.²⁹ The following year Congress passed an authorization for the Director of the Mint, with the approval of the Treasury Secretary, to put the motto on any gold and silver coins of the United States where it would fit.³⁰ The permission was repeated in the coinage act of February 12, 1873.³¹

The motto *In God we trust* was first placed on coins during the Rebellion to provide evidence of the Christian, God-fearing qualities of the American people.³² Once the nation was relieved from the ignominy of heathenism by the placement of *In God we trust* on some American coins, the matter rested for four decades until the First Omission, during the administration of Theodore Roosevelt, to which we now turn.

B. Theodore Roosevelt and the First Omission

President Theodore Roosevelt became embroiled in controversy over *In God we trust* because he wanted a dramatic redesign of our coinage.³³ In early 1905, he arranged for sculptor Augustus Saint-Gaudens to design new \$10 and \$20 gold coins.³⁴ The President was involved in the design of the coins, and directed that *In God we trust* not be included in the design,³⁵ a request with which Saint-Gaudens complied.³⁶

When Saint-Gaudens' work was made public, the absence of *In God we trust* caused a public outcry.³⁷ For example, after a protracted and tumultuous debate, one mainstream religious denomination took a decisive stand:

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*; see also CONG. GLOBE, 42nd Cong., 3d Sess. 672 (1873).

³² This was confirmed in a 1908 speech by Congressman Charles C. Carlin of Virginia to the House:

I believe that the world already understands that we are a Christian, God-fearing, God-loving people, and it was not necessary to emphasize this fact by the statute which originally allowed this motto to be placed upon our coins. But it was done at a time when civil war was upon us; when the hand of brother was turned against brother; when the minds of men were enraged, and the settlement of problems was submitted to the arbitrament of arms, the result of which no man could at that time foretell. . . .

It was at this time, viz., November, 1861, that a Pennsylvania minister advised the Secretary of the Treasury, Mr. Salmon P. Chase, "that this nation might perish and that there should be some evidence of the religious faith of its inhabitants preserved upon its coins."

42 CONG. REC. 3384 (1908) (statement of Rep. Carlin).

³³ Q. David Bowers, *Notes on the 1907 Saint-Gaudens \$10 with Periods, Wire Rim*, USPATTERNS.COM (Apr. 13, 2001), <http://uspatterns.com/j1774p19951.html>.

³⁴ *Id.*

³⁵ *Roosevelt Dropped 'In God We Trust': President Says Such a Motto on Coin Is Irreverence, Close to Sacrilege*, N.Y. TIMES, Nov. 14, 1907, at 1, <http://query.nytimes.com/mem/archive-free/pdf?res=9406E2D8103EE033A25757C1A9679D946697D6CF>. Reproduced in Appendix C.

³⁶ Bowers, *supra* note 33.

³⁷ *Roosevelt Dropped 'In God We Trust'*, *supra* note 35 ("[N]umerous protests . . . have been received at the White House against the new gold coin which have [sic] been coined without the words 'In

After a red-hot debate the Episcopal Diocesan Convention . . . yesterday, by a vote of 131 to 81, passed resolutions protesting against the elimination of the motto, "In God We Trust," from the new ten-dollar gold pieces. The debate on the question lasted an hour and a half, and for a part of that time the convention was in some disorder.³⁸

The Episcopalians protested against the omission and declared "that the highest interest of our country demands the preservation of all those customs that have stood for the recognition of God in the life of the people."³⁹

President Roosevelt issued a letter outlining his position.⁴⁰ He noted that there was no legal requirement that *In God we trust* be on coins, that he "did not approve of it," and that he "did not direct that it should again be put on."⁴¹ President Roosevelt's position was not based on a disagreement with the sentiment or from feeling that the motto was inappropriate for government display, far from it:

It is a motto which is, indeed, well to have inscribed on our great National monuments, in our temples of justice, in our legislative halls, and in buildings such as those at West Point and Annapolis—in short, wherever it will tend to arouse and inspire a lofty emotion in those who look thereon.⁴²

The President described the motto as "[a] beautiful and solemn sentence . . . [that] should be treated and uttered only with that fine reverence which necessarily implies a certain exaltation of spirit."⁴³ The use of the motto on coins, Roosevelt declared, bordered on sacrilege: "My own feeling in the matter is due to my very firm conviction that to put such a motto on coins, or to use it in any kindred manner, not only does no good, but does

God We Trust' . . ."). Controversy over Saint-Gaudens' designs was not limited to the omission of *In God we trust*. The \$10 design was criticized when it was alleged that the model for the female figure on the obverse, Mary Cunningham, was not American-born. The Order of Independent Americans, "admitting her rare beauty, object[ed] because she was born in Ireland." Bowers, *supra* note 33. Another rumor asserted that the model was "said to have been taken from the portrait of his mistress, Davida Clark, with whom he is alleged to have had a child (although biographers have never been able to confirm this)." *Id.*

³⁸ *Denounce Coin Motto Order: Episcopal Convention Votes, 131 to 81, to Retain "In God We Trust,"* N.Y. TIMES, Nov. 14, 1907, at 1, <http://query.nytimes.com/mem/archive-free/pdf?res=9406E2D8103EE033A25757C1A9679D946697D6CF>. It does not appear that opposition within the convention to the resolution of condemnation was based on any question about the propriety of linking the federal government and Christianity. One opponent, Dr. Gustav Carstensen, opposed the resolution because it gave a misleading inference about the religious faith of the nation: "I think this effort is a mistake and misleading in the inference that we go as a nation back into apostasy. Our godliness is not shown in this . . ." *Id.* Another opponent, Dr. Loring W. Batten, opposed the resolution, and the inclusion of the motto on currency, on Biblical grounds: "Dr. Batten admitted that the spirit of the resolution was good. . . . 'It looks to me . . . as if this motto were upon the coins against the express command: "You cannot worship God and Mammon.'"" *Id.*

³⁹ *Id.*

⁴⁰ *Roosevelt Dropped "In God We Trust,"* *supra* note 35.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

positive harm, and is in effect irreverence, which comes dangerously close to sacrilege.”⁴⁴ President Roosevelt was worried that the use of *In God we trust* on coins would be akin to its use in advertisements, and would debase it:

Any use which tends to cheapen it, and, above all, any use which tends to secure its being treated in a spirit of levity, is from every standpoint profoundly to be regretted. . . . But it seems to me eminently unwise to cheapen such a motto by use on coins, just as it would be to cheapen it by use on postage stamps or in advertisements.⁴⁵

Indeed, he cited his own experiences:

I have never heard any human being speak reverently of this motto on the coins or show any signs of its having appealed to any high emotion in him, but I have literally, hundreds of times, heard it used as an occasion of and incitement to the sneering ridicule which it is, above all things, undesirable that so beautiful and exalted a phrase should excite.⁴⁶

The President allowed that the question was “absolutely in the hands of Congress,” and promised that “any direction of Congress in the matter will be immediately obeyed.”⁴⁷ But, he concluded his letter, “I very earnestly trust that the religious sentiment of the country, the spirit of reverence in the country, will prevent any such action being taken.”⁴⁸

Clearly, Congress did not share the President’s analysis that the inclusion of *In God we trust* on coins was sacrilegious. On January 7, 1908, the matter was addressed in the House. Congressman Morris Sheppard of Texas spoke of the motto *In God we trust* in religious terms, characterizing it as “this striking sentence so expressive of American reverence and faith.”⁴⁹ Asserting that “God is the source of liberty and religious freedom the basis of political independence,” he observed that the “American people are fundamentally a religious people,”⁵⁰ and then proceeded to describe a citizenry unified on matters religious:

Perhaps every form of religious thought is represented among us and yet we are one in the recognition of a supreme and all-wise God. The opportunity to worship the omnipotent Father according to the conscience of the individual is the basis of American history, the corner-stone of the American Commonwealth. There is an essential relation between God and freedom. Liberty as

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* President Roosevelt cited examples of such jokes, the humor of which may escape modern audiences, unaccustomed as we are to free-silver humor:

For example, throughout the long contest extending over several decades on the free coinage question, the existence of this motto on the coins was a constant source of jest and ridicule, and this was unavoidable. Every one must remember the innumerable cartoons and articles based on phrases like “In God we trust for the 8 cents,” “In God we trust for the short weight,” “In God we trust for the 37 cents we do not pay,” and so forth and so forth.

Id.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ 42 CONG. REC. 511 (1908) (statement of Rep. Sheppard).

⁵⁰ *Id.*

a permanent prerogative of the people was for all practical purposes an impossible conception before Abraham's proclamation of the one all-seeing God.⁵¹

He traced the role of God in the democratization of the world:

[M]en who had worshipped kings and idols came soon to realize that the God of the spirit was the only rightful sovereign. They came soon to understand that with the same spiritual Father men were brothers both here and hereafter. It followed immediately that men were spiritual and political equals, and liberty, equality, fraternity, dawned upon the human race.⁵²

Following this, he traced the hand of God in the founding and history of the United States:

The beginnings of the United States were essentially religious, and a divine purpose may be seen in the events which made possible our country and its institutions. Surely there was omnipotent design in the fact that the invention of printing, the discovery of America, and the European Reformation took place within the same century. . . . Thus under the especial favor of Providence America began. . . . [T]he finger of God may be traced in every crisis of American history and that the dominant note of American character has been an unfaltering trust in the wisdom and justice of Omnipotence.⁵³

Indeed, Congressman Sheppard concluded,

[T]he hosts of earth's exiled and earth's wronged—flourished here under difficulties so tremendous, such pestilences, famines, massacres, and dissensions, that their preservation and advancement can be attributed to no other source than the God whose worship they came to maintain in its original purity, whose freedom they were to transmit to posterity and eternity.⁵⁴

Following his protracted historical exegesis, Congressman Sheppard turned to whether the motto *In God we trust* should be returned to the nation's currency. He cast his argument in religious terms:

It is particularly appropriate that the inscription "In God we trust" should appear upon our national moneys. The coinage of a country is the most concrete and universal evidence of its sovereignty. Is it not fitting that this most elemental expression of government should contain a recognition of the power to which the Government owes its foundation, its growth, its glory . . . ? I believe . . . that the beautiful and stately sentence "In God we trust," so symbolic of American history, American aspiration, American faith, should be permanently inscribed upon the coinage of the United States.⁵⁵

To bolster his case, Congressman Sheppard appended in the record a selection of editorials and letters from the *Christian Herald*. The editorial position of the paper was that it was sacrilegious to remove the motto, an impious falsification of history to remove the recognition due God.⁵⁶ The letters

51 *Id.*

52 *Id.*

53 *Id.* at 512 (preceding a note of "[Applause.]" in the record).

54 *Id.* (preceding a note of "[Applause.]" in the record).

55 *Id.* at 513 (preceding a note of "[Applause.]" in the record).

56 Editorial, *Let Congress Restore It*, 30 CHRISTIAN HERALD 1116 (1907), as reprinted in 42 CONG. REC.

reproduced at Congressman Sheppard's behest were also religious in tone, including declarations that America was a Christian nation, such as the one that asked what the motto would mean to future generations: "Congress should restore the motto on our national coins as the motto of all our basic laws. Historians of future centuries would then know beyond doubt that those coins represented a Christian nation which trusted in God, notwithstanding the skeptic's opinion."⁵⁷

Another range of letters cast the inclusion of the motto on coins as a means of praising God for blessing this, his beloved country, such as the one that stated that God wanted the recognition: "The motto is an expression of honor, gratitude, and love from the American nation to the God who made them free. The God of love wants public expression from His people that the world may see and profit by it, and He honors any opportunity taken to acknowledge Him."⁵⁸

513 app. A. at 513 (1908) ("[A] great wrong has been committed in sacrilegiously removing the words which imply national recognition of God's protecting care over our land and people and that dishonor has been done to the memories of those noble men who, in a time of severe national stress and trial, place the motto on our coinage. . . . Let us see to it that we do not falsify history by impiously effacing from our coinage the recognition due to Him to whom we owe all our national greatness, happiness, and prosperity.").

57 F. S. Cushion, Letter to the Editor, *Congress Should Restore It*, 30 CHRISTIAN HERALD 1124 (1907), as reprinted in 42 CONG. REC. 513 app. A. at 514 (1908); see also B. L. Turner, Letter to the Editor, *Cling to the Motto*, 30 CHRISTIAN HERALD 1124 (1907), as reprinted in 42 CONG. REC. 513 app. A. at 514 (1908) ("If we, as a Christian nation, allow the removal of our motto, 'In God we trust,' from our coins on account of ridicule and irreverence, we disown God Can our nation afford to do this?"); E. B. Stark, Letter to the Editor, *We Need God's Help Always*, 30 CHRISTIAN HERALD 1124 (1907), as reprinted in 42 CONG. REC. 513 app. A. at 514 (1908) ("We are a Christian nation, but there is much to alarm us. . . . There is so much lawlessness and ungodliness that we need all the help and the recognition of our God to sustain us in our perils."); G. W. Walker, Letter to the Editor, *Let Congress Restore It*, 30 CHRISTIAN HERALD 1124 (1907), as reprinted in 42 CONG. REC. 513 app. A. at 514 (1908) ("Am now nearing the four-score mark, but hope and pray, ere God calls me home, to see this motto replaced on our coins, thus acknowledging God who has kept us and manifesting to the world that we are a Christian people."); Chauncey N. Pond, Letter to the Editor, *Should Be Instantly Replaced*, 30 CHRISTIAN HERALD 1125 (1907), as reprinted in 42 CONG. REC. 513 app. A. at 515 (1908) ("While absolutely nonsectarian, it expresses the deep, unwavering faith of the vast mass of our people. Its removal shocks the moral sense of the nation, and nothing less than its prompt and full restoration will satisfy the conscience of this Christian land."); E. Francis, Letter to the Editor, *Don't Haul Down the Banner*, 30 CHRISTIAN HERALD 1125 (1907), as reprinted in 42 CONG. REC. 513 app. A. at 515 (1908) ("The removal of the motto shows an evidence of weakness and a catering to the adversary on the part of the authorities in power. So long as we claim to be a Christian nation, Christian mottoes should dominate its citizens. When a professedly Christian nation obliterates its Christian motto it permits or licenses the banner of truth to be hauled down and trampled under the feet of men."); W. C. Oliver, Letter to the Editor, *A Blow at Christian Sentiment*, CHRISTIAN HERALD 1125 (1907), as reprinted in 42 CONG. REC. 513 app. A. at 515 (1908) ("The motto has adorned our coin for many years; and if left off now, the effect will certainly not aid or increase Christian sentiment, but rather the reverse. We should trust God in all things. Why, then, is the motto out of place on our coins when we claim to be a Christian nation?").

58 Ada F. Button, Letter to the Editor, *Let the Motto Stand*, 30 CHRISTIAN HERALD 1124 (1907), as reprinted in 42 CONG. REC. 513 app. A. at 514 (1908); see also Elbridge G. Stout, Letter to the Editor, *This Is*

Another group asserted that the motto represented the religious faith of the nation, such as the one that characterized the motto as “a sermon in itself”: “We should keep the sacred motto, ‘In God we trust,’ on all our national coinage, because it is a sermon in itself and shows to the world that we as a nation believe in one God and recognize Him in our very commercial life.”⁵⁹

Others asserted that removing the motto from coins constituted blasphemy or a lack of reverence, such as the one that asked how to characterize the President’s action: “The Government of the United States has for many years proclaimed to the world that ‘In God we trust,’ but now she backs down; takes it all back. We trust in God no longer. If that is not blasphemy, what is it?”⁶⁰

A number of the letters cast the question over the inclusion of the motto on coins as a battle between the forces of God and God’s opponents, such as the letter exhorting the faithful: “Let us nail our colors to the masthead and go on to either defeat or victory, with our banners flying and with our trust in the living God emblazoned upon our coinage!”⁶¹

“*God’s Country*,” 30 CHRISTIAN HERALD 1124 (1907), as reprinted in 42 CONG. REC. 513 app. A. at 513 (1908) (“As this is God’s beloved country, the words should certainly be retained along with the American eagle.”); S. A. D. H., Letter to the Editor, *God the Nation’s Strength*, 30 CHRISTIAN HERALD 1124 (1907), as reprinted in 42 CONG. REC. 513 app. A. at 513 (1908) (“Who but God has been our strength and stay and made us the nation we are to-day? Praise and honor to His holy name.”).

⁵⁹ J. M. Stoner, Letter to the Editor, *A Dangerous Step*, 30 CHRISTIAN HERALD 1124 (1907), as reprinted in 42 CONG. REC. 513 app. A. at 514 (1908); see also Minna O. Brand, Letter to the Editor, *The Nation Should Trust in God*, 30 CHRISTIAN HERALD 1124 (1907), as reprinted in 42 CONG. REC. 513 app. A. at 513 (1908) (“It inspired us to know that we, as a nation, trusted in God, and were not ashamed to admit it. May we continue to trust in God as a little child would trust its mother.”); Charles B. Thompson, Letter to the Editor, *It Expresses the Nation’s Faith*, 30 CHRISTIAN HERALD 1124 (1907), as reprinted in 42 CONG. REC. 513 app. A. at 514 (1908) (“A motto expressive of patriotism has no more right upon our coins than one expressive of the faith without which a nation would presently find itself in the dust. Old Glory is not too good for everyday use; neither is the grand old motto, which has so long publicly expressed the highest faith of the great American people.”); Julia Billings, Letter to the Editor, *A Strong Protest Urged*, 30 CHRISTIAN HERALD 1125 (1907), as reprinted in 42 CONG. REC. 513 app. A. at 515 (1908) (“Let us hope that a strong protest on the part of our people may assure the continued imprint of a sentiment which acknowledges faith in the Almighty.”).

⁶⁰ E. R. Reed, Letter to the Editor, *Is It Blasphemy?*, 30 CHRISTIAN HERALD 1125 (1907), as reprinted in 42 CONG. REC. 513 app. A. at 515 (1908); see also N. W. Merrill, Letter to the Editor, *Like the Atheism of France in 1790*, 30 CHRISTIAN HERALD 1124 (1907), as reprinted in 42 CONG. REC. 513 app. A. at 513 (1908) (“No Christian . . . can possibly object to the stamping of that dear name and motto for which their fathers suffered so much. I never dreamed that President Roosevelt would sanction such a want of reverence.”).

⁶¹ Elizabeth A. Reed, Letter to the Editor, *Keep the Banner Flying*, 30 CHRISTIAN HERALD 1125 (1907), as reprinted in 42 CONG. REC. 513 app. A. at 515 (1908); see also W. T. Lone, Letter to the Editor, “*God Forbid*,” 30 CHRISTIAN HERALD 1124 (1907), as reprinted in 42 CONG. REC. 513 app. A. at 514 (1908) (“There are only two great leaders in the world, Christ and the devil. . . . Which of these desires the motto on our coins to remain, and which wants it erased?”); E. M. Sapp, Letter to the Editor, *Will the Bible Be Dropped Next?*, 30 CHRISTIAN HERALD 1124 (1907), as reprinted in 42 CONG. REC. 513 app. A. at 514 (1908) (“The dropping of the motto must have its root very near the borders of atheism; the next step may be the dropping of the Bible, as in the time of the French revolution.”); Paul

Among the most memorable expressions reproduced from the *Christian Herald* by Congressman Sheppard were four works of poetry, more or less. One asked that God not be insulted and set aside by removing the motto from coinage,⁶² another asked if America was not still a Christian nation,⁶³ and the third characterized American currency with the motto as “God’s own coin.”⁶⁴ Surely the best poem cited by Congressman Sheppard was both the shortest and the only one which was secular in tone: “Let all the people together join / And keep the motto on the coin.”⁶⁵

Congressman Henry S. Boutell of Illinois spoke briefly against restoration of the motto to the nation’s coinage.⁶⁶ He began by conceding “that in every fit and appropriate way the American people should show to the world that we are a God-fearing people.”⁶⁷ He merely felt, with President Roosevelt, that putting the motto on coins was not the appropriate way in which to profess our national religious views. For authority, Congressman Boutell concluded by reading from the Bible, specifically from the twenty-second chapter of the Book of Matthew, concluding with the injunction to “[r]ender therefore unto Caesar the things which are Caesar’s; and unto God the things that are God’s.”⁶⁸

On March 16, 1908, the matter came back before the House. Representative Charles C. Carlin of Virginia spoke on behalf of the subcommittee

Grabill, Letter to Editor, *They Stand for Our Highest Ideal*, 30 CHRISTIAN HERALD 1125 (1907), as reprinted in 42 CONG. REC. 513 app. A. at 514 (1908) (“If removed, what a lever it will put into the hands of the atheist!”).

62 See B. L. Turner, Letter to the Editor, *Cling to the Motto*, 30 CHRISTIAN HERALD 1124 (1907), as reprinted in 42 CONG. REC. 513 app. A. at 514 (1908) (“Cling to our motto, ‘In God we trust,’ / This for our nation surely is just. / God is our leader, He is our Guide, / Do not insult and set Him aside.”).

63 A. R. P., Letter to the Editor, *Put Back the Motto*, 30 CHRISTIAN HERALD 1124 (1907), as reprinted in 42 CONG. REC. 513 app. A. at 514 (1908) (“Shall we not have the motto still, / These words, ‘In God we trust,’ / Upon our gold and silver coins? / Yes keep it there we must. / Our God has fought our battles well, / Kept us through good and ill; / Has given us peace and plenty, too; / Can we not trust Him still? / Are we a Christian nation yet, / And fear the truth to own? / ‘In God we trust,’ oh, let that fact / In every land be known. / Put back the motto on our coin, / And let us keep it there; / And as a nation by our deeds, / Its truthfulness declare.”).

64 Theodore Low, Letter to the Editor, *Restore the Words*, 30 , at 1124 (1907), as reprinted in 42 CONG. REC. 513 app. A. at 514 (1908) (“‘In God we trust.’ Most woeful day / When ceases thus our land to pray. / Restore the words you took away / From off our coins—brook no delay. / No matter what the scoffers say, / ‘In God we trust’—no better way. / Then lift us high, don’t drag us down, / And with the stars let’s wear the crown. / ‘In God we trust’—let’s pass it on / Each time we trade with God’s own coin. / Let’s raise the standard to the throne, / On coin, in life, the Lord to own.”).

65 John Owen, Letter to the Editor, *How an Immigrant Views It*, 30 CHRISTIAN HERALD 1124 (1907), as reprinted in 42 CONG. REC. 513 app. A. at 514 (1908).

66 42 CONG. REC. 516 (1908) (statement of Rep. Boutell).

67 *Id.*

68 *Id.* (quoting *Matthew* 22:21).

from which H.R. 17296 emerged. He explained the rationale for the measure: “This action upon the part of the committee furnishes a lesson to the country and the world to the effect that this is a Christian nation”⁶⁹

Congressman Carlin sought to justify the expression of religious faith in the motto *In God we trust* by demonstrating that the United States was not the first nation to proclaim its religious faith through the use of a motto: “We can not claim any unique distinction for having pointed, by the use of a motto, to the faith of our fathers. We were not the first nation to adopt a motto emphasizing its religious faith or belief”⁷⁰

He then placed the United States in the history of such national professions of religious faith or belief, starting with Constantine and Rome in A.D. 312 and continuing with the Byzantine Empire, the Hebrews, the Arabs, England, Scotland, France, Portugal, Russia, Switzerland, Bavaria, Brunswick, Luneburg, Prussia, Saxony, Austria, Hungary, India, Belgium, Naples, Sicily, Italy, Denmark, and Brazil.⁷¹ Looking at examples of nations which “represented upon [their] coins [their] faith in the Supreme Ruler of the Universe,” and coins as “a medium of giving expression to religious belief,” the Congressman turned his attention to “evidence of religious faith upon the coins in America,” and found pre-Revolutionary examples from the colonies of New Jersey, Carolina, New England, Louisiana, and Virginia.⁷² Before turning his attention to the placement of the motto on coins during the Rebellion, Congressman Carlin noted the example of Utah, which placed the inscription “Holiness to the Lord” on gold pieces it issued in 1849, as a reference “to the existence of an Omnipotent Being.”⁷³

Congressman Carlin began to conclude his plea for return of the motto with a statement regarding the underlying religious message of that inscription:

In every Christian heart there beats the hope that you will by your action determine that the circulating coin of this country shall carry the knowledge that we are a Christian people; that we believe that, however strong men grow, however powerful nations may become, there is a just, merciful, and eternal God, in whom the civilized world can faithfully and implicitly put its trust.⁷⁴

He concluded by linking the motto with Christian triumphalism:

Mr. Chairman, we are a united people; civil war and strife are forever banished from our land; eternal peace on earth and good will toward men is the hope of every patriotic citizen. This is and will be as long as we are firm and steadfast in the teachings of the God of Israel, and I entertain the hope and belief that before the world has seen another century, Christian thought and

⁶⁹ *Id.* at 3384 (statement of Rep. Carlin).

⁷⁰ *Id.*

⁷¹ *Id.* at 3384–85.

⁷² *Id.* at 3385.

⁷³ *Id.*

⁷⁴ *Id.*

Christian ideals will control the hearts and minds of all men and upon the wall of every home throughout the universe there will hang, for the enlightenment and encouragement of all who may follow, the sacred motto, "In God we trust."⁷⁵

Congressman Carlin was followed by Congressman Ollie M. James of Kentucky, who announced that "the Christian legions of this nation will hail with delight favorable action upon this bill."⁷⁶ He tied the inscription of the motto on currency to missionary efforts abroad:

This country is not only a Christian nation, but we are engaged in sending to foreign countries and to distant people our missionaries to preach the religions of Jesus Christ, and we want our money so that when this gold that you say is so good goes across the ocean and is held in the hands of those who do not know of the existence of the Saviour of the world, we can say: "Here are the dollars of the greatest nation on earth, one that does not put its trust in floating navies or in marching armies but places its trust in God."⁷⁷

Congressman J. Hampton Moore of Pennsylvania cast the return of the motto to our coinage as a victory in the struggle between believers and non-believers. He started with a description of what followed from the removal of the motto and the introduction of the bills to restore it:

Men have been emboldened to write in defiance of all religious sentiment. They have hailed the removal of the motto as a revolt against the wholesome teachings of the ages. This we should not tolerate. . . . [W]hen such a challenge is put forth, a challenge that enters into every home and fireside, which confronts you and me as we go into our closet in secret to perform that one act of humility which makes worth in man, then I feel it is time to rise and declare, even by law, that this is a God-fearing nation, and that Congress can do no harm in making that declaration emphatic. . . . [W]hat harm can we possibly do by acknowledging to the world that God has a place in our institutions? It can hurt none; it will console and comfort many.⁷⁸

Congressman Sheppard returned to the House floor to speak of the religious conflict bound up in the status of the motto:

I desire merely to call attention to the fact that almost every infidel in the country has openly rejoiced over the removal of this motto. Frequently Congress has been flooded with circulars from infidel societies, protesting against the restoration of this legend. . . . The fact that the infidels openly object to their restoration, the fact that their removal would be used as an argument to destroy reverence rather than to inculcate it, ought to prompt Congress unanimously to restore the words, "In God we trust."⁷⁹

⁷⁵ *Id.* (preceding a note of "[Loud applause.]" in the record).

⁷⁶ *Id.* (statement of Rep. James).

⁷⁷ *Id.* (preceding a note of "[Loud applause.]" in the record).

⁷⁸ *Id.* at 3386 (statement of Rep. Moore) (preceding a note of "[Applause.]" in the record).

⁷⁹ *Id.* at 3386–87 (statement of Rep. Sheppard) (preceding a note of "[Applause.]" in the record).

Congressman Charles G. Edwards of Georgia took up the theme of religious conflict, first allowing that he, unlike others, did not believe that President Roosevelt was “an infidel.”⁸⁰ He did, however, cast the conflict in terms of infidelity:

That infidels all over the country openly rejoiced in the fact that the word “God” was stricken from our money is now a well-known fact. Certain societies, known to be infidelic, have been protesting by mail to Congressmen and Senators against the restoration of this sentence. The removal of this sentence from our coin did not depreciate its monetary value, but it depreciated its sentimental value. The removal of these words was a victory for infidelity. The restoration of them to our coin will be a blow to infidelity and a victory for the God-fearing people of this great nation.⁸¹

Notwithstanding the infidels who did not favor returning the motto to coins, Congressman Edwards was clear that the nation was unified behind his position:

This is no sectarian question. The Methodist, the Baptist, the Presbyterian, the Catholic, the Hebrews, the Episcopal, in fact all churches, all creeds, who have a belief in God, are as one in the opinion that it was a great mistake to ever have removed this motto from our coins, and they are one in the sentiment that this motto shall be restored.⁸²

He noted the history of the motto, arising from the national division of the Rebellion, but asserted that the nation was united in wanting the motto returned as evidence of the religious convictions of the nation:

[T]he sentiment was born when we were a divided people. To-day, thank God! we are a reunited people forever. We are but one people, with but one country and one God, with an underlying patriotism for our country and a steadfast faith in God. The American people are glad to honor themselves and their country by having God’s name upon their coins. “We are fundamentally a religious people. We are distinguished by our devotion to religious and civil freedom.” I dare say that every form of religious thought is represented in America, and yet we are one in the recognition of a supreme and all-wise God.⁸³

But, in the end, Congressman Edwards returned to the motto on coins as a symbol of religious victory over the infidels: “God has undoubtedly watched over us and directed us to national greatness, and I firmly believe that it is because we are a God-fearing nation.”⁸⁴ He had already endorsed the quality of being God-fearing:

I am not ashamed to proclaim my faith in God. We need God-fearing men in all public positions. A man who is not sound in his belief in God has no right in high office, which is the gift of a God-fearing people. We represent God-fearing people, and we, their representatives, should be God-fearing representatives.⁸⁵

⁸⁰ *Id.* at 3387 (statement of Rep. Edwards) (“I do not charge, as some do, that the President is an infidel.”).

⁸¹ *Id.* (preceding a note of “[Applause.]” in the record).

⁸² *Id.* (preceding a note of “[Applause.]” in the record).

⁸³ *Id.*

⁸⁴ *Id.* at 3388.

⁸⁵ *Id.* at 3387.

The Congressman concluded with an appeal for the motto, cast in terms of religious advocacy:

If we would continue as the greatest of the nations of the world we must continue our faith in God. The history of the nation that forgets God is sooner or later written in ruin. Let us therefore fight infidelity until it is literally stamped out of our country. Let us not retrograde, but rather let us go forward. Let us do nothing that smacks of national infidelity. Let us not put an “infidel money” out upon the world, but let us put out the coin that says to all the world “Americans are a God-fearing and God-loving people.”⁸⁶

There were few voices raised in the House of Representatives against restoring the motto the nation’s coins. Congressman Küstermann of Wisconsin opposed returning the motto to coinage: “I am against replacing the motto ‘In God we trust’ on our coins, because I do not believe in any religion that in order to thrive needs *advertising*, nor do I believe in any person that always hangs out his shingle ‘I am a Christian.’”⁸⁷ Congressman George W. Gordon of Tennessee characterized placing the motto on coins as “rather a show of conventional hypocrisy than of patriotic reverence,” which was “a medium of secular, and not sacred, transactions.”⁸⁸ He asked, because people did not stop to consider “its sacred significance,” “[D]oes it not seem rather a device of hypocrisy and irreverence than of sincerity and veneration?”⁸⁹

The committee report in the House reflected a religious motivation for the action. Asserting that “the measure simply reflects the reverent and religious conviction which underlies American citizenship,” the Committee adopted the subcommittee’s rationale for the restoration of the motto to the nation’s coins:

Your subcommittee is unanimous in the belief that as a Christian nation we should restore this motto to the coinage of the United States upon which it was formerly inscribed “as an outward and visible form of the inward and spiritual grace,” which should possess and inspire American citizenship, and as an evidence to all the nations of the world that the best and only reliance for the perpetuation of the republican institution is upon a Christian patriotism, which, recognizing the universal fatherhood of God, appeals to the universal brotherhood of man as the source of the authority and power of all just government.⁹⁰

The measure passed the House of Representatives 259-5.⁹¹ As he had indicated he would, President Roosevelt signed a resolution “That the motto ‘In God We Trust,’ heretofore inscribed on certain denominations of the gold and silver coins of the United States of America, shall hereafter be inscribed upon all such gold and silver coins of said denominations as heretofore.”⁹²

⁸⁶ *Id.* at 3389.

⁸⁷ *Id.* at 3386 (statement of Rep. Küstermann).

⁸⁸ *Id.* at 3389 (statement of Rep. Gordon).

⁸⁹ *Id.* at 3390.

⁹⁰ H.R. REP. NO. 60-1106, at 1-2 (1908).

⁹¹ 42 CONG. REC. 3391(1908).

⁹² Act of May 18, 1908, Pub. L. No. 60-120, 35 Stat. 164 (codified at 31 U.S.C. § 5112(d)(1) (2012)).

Once the nation was saved from infidelity by the return of *In God we trust* to some American coins, the matter rested for almost five decades until the expansion of the practice during the McCarthy era, to which we now turn.

C. Expansion During the McCarthy Era

Although after 1907, *In God we trust* appeared on virtually all American coins, it did not appear on American bills. This was remedied during the McCarthy era, in July of 1955, when legislation was approved requiring the motto on all coins and currency of the United States.⁹³

Insight into the administrative and legislative purpose behind the decision to require *In God we trust* on currency can be gained from a related action taken the year before, the modification of the Pledge of Allegiance to include the words “under God.”⁹⁴ The purpose of that action was hardly secular. In his signing message, President Eisenhower started by noting that “From this day forward, the millions of our school children will daily proclaim in every city and town, every village and rural school house, the dedication of our nation and our people to the Almighty.”⁹⁵ He concluded his statement by

⁹³ Act of July 11, 1955, Pub. L. No. 84-140, 69 Stat. 290. This predated another McCarthy-era act, the adoption of *In God we trust* as our national motto, which happened a year later, in July of 1956. Act of July 30, 1956, Pub. L. No. 84-851, 70 Stat. 732 (codified as amended at 36 U.S.C. § 302 (2012)).

⁹⁴ Act of June 14, 1954, Pub. L. No. 83-396, 68 Stat. 249 (codified as amended at 4 U.S.C. § 4 (2012)) (“I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all.”). The argument has been made that notwithstanding the inclusion of the words “under God,” recitation of the Pledge is a patriotic, not a religious, exercise. In *Elk Grove Unified School District v. Newdow*, Chief Justice Rehnquist argued that the Pledge

is a declaration of belief in allegiance and loyalty to the United States flag and the Republic that it represents. The phrase “under God” is in no sense a prayer, nor an endorsement of any religion, but a simple recognition of the fact noted in H. R. Rep. No. 1693, at 2: “From the time of our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God.” Reciting the Pledge, or listening to others recite it, is a patriotic exercise, not a religious one; participants promise fidelity to our flag and our Nation, not to any particular God, faith, or church.

Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 31 (2004) (Rehnquist, C.J., concurring in the judgment). In one sense, of course, the argument is correct. As originally framed, the Pledge of Allegiance was not a religious affirmation for the simple reason that as originally framed the Pledge did not include the language “under God.” As originally framed in 1892 by socialist Francis Bellamy, the pledge read: “I pledge allegiance to my Flag and the Republic for which it stands, one nation, indivisible, with liberty and justice for all.” *The Pledge of Allegiance*, UShistory.org, <http://www.ushistory.org/documents/pledge.htm> (last visited Oct. 31, 2017). In 1923 the text was changed to make it specific to the United States: “I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands, one nation, indivisible, with liberty and justice for all.” *Id.*

⁹⁵ President Dwight D. Eisenhower, Statement by the President Upon Signing Bill to Include the Words “Under God” in the Pledge to the Flag (June 14, 1954), in PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES, DWIGHT D. EISENHOWER, 1954, at 563 (1960).

asserting the “profound meaning” of the law: “In this way we are reaffirming the transcendence of religious faith in America’s heritage and future”⁹⁶

The next year, Congress took up the related question of requiring by statute that the motto *In God we trust* be placed on all currency of the nation. The formal discussion started on April 13, 1955, when Congressman Bennett of Florida spoke in favor of H.R. 619, his bill “to provide that all United States currency shall bear the inscription ‘In God we trust.’”⁹⁷ His stated rationale was a mix of Cold War politics and religion:

In these days when imperialistic and materialistic communism seeks to attack and to destroy freedom, it is proper for us to seek continuously for ways to strengthen the foundations of our freedom. At the base of our freedom is our faith in God and the desire of Americans to live by His will and by His guidance. As long as this country trusts in God, it will prevail. To remind all of us of this self-evident truth, it is proper that our currency should carry these inspiring words, coming down to us through our history: “In God we trust.”⁹⁸

On June 7, 1955, the House took up and passed H.R. 619 unanimously, with little discussion.⁹⁹ Besides repeating his comments from April, Congressman Bennett again made the religious link: “Nothing can be more certain than that our country was founded in a spiritual atmosphere and with a firm trust in God. While the sentiment of trust in God is universal and timeless, these particular four words ‘In God We Trust’ are indigenous to our country.”¹⁰⁰

The Senate took up the resolution three weeks later, under the leadership of Senator Lyndon Johnson of Texas. He described as “an oversight” the fact that paper money had been issued for almost a century with “no inscription . . . reflecting the spiritual basis of our way of life.”¹⁰¹ With no debate, the Senate passed the measure to “reaffirm a policy which has been in existence for over 75 years by way of expressing our trust in God.”¹⁰²

Once the nation had affirmed the spiritual basis of our way of life by having *In God we trust* on all American currency, the matter rested for five decades, until the Second Omission, during the administration of George W. Bush, to which we now turn.

⁹⁶ *Id.*

⁹⁷ 101 CONG. REC. 4384 (1955) (statement of Rep. Bennett).

⁹⁸ *Id.*

⁹⁹ *Id.* at 7796 (statement of Rep. Bennett).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 9448 (statement of Sen. Johnson).

¹⁰² *Id.* at 9449 (statement of Sen. Monroney). The Senate floor discussion was diverted by two ancillary matters. Senator Carlson from Kansas wanted to put *In God we trust* on postage stamps. *Id.* at 9448 (statement of Sen. Carlson). Senator Case of South Dakota wanted to place an image of Mount Rushmore on the one-dollar bill. *Id.* at 9448 (statement of Sen. Case).

D. George W. Bush and the Second Omission

A century after Theodore Roosevelt dealt with the disappearance of *In God We Trust* from our coinage, George W. Bush faced much the same problem. His challenge arose in 2007 with the issue of the Presidential-series one-dollar coin.¹⁰³ Like the First Omission under President Roosevelt, the Second Omission under President Bush was caused by an ambitious plan to make the national coinage more dramatic and modern.

Like the situation a century earlier, the Second Omission started without any drama. In December of 2005, Congress passed the statutory authorization for a new series of one-dollar coins, honoring America's presidents.¹⁰⁴ The bill was not controversial; it passed the Senate by unanimous consent and the House by a vote of 291-113.¹⁰⁵ President Bush signed the bill into law days before Christmas, 2005.¹⁰⁶

The statute authorizing the presidential series of one-dollar coins provided for the design of both the obverse and the reverse. The obverse was to have "the name and likeness of a President" and certain "basic information" about that President.¹⁰⁷ In addition to the inscriptions "\$1" and "United States of America," the reverse was to have "a likeness of the Statue of Liberty extending to the rim of the coin and large enough to provide a dramatic representation of Liberty while not being large enough to create the impression of a '2-headed' coin."¹⁰⁸ The provision which ultimately proved so controversial required *In God we trust* and *E Pluribus Unum* be done as "edge-incused inscriptions."¹⁰⁹ Edge-incused inscriptions are those carved into the rim of the coin, on neither the obverse nor the reverse face. The statute

¹⁰³ In 1971, after a thirty-five-year hiatus in the production of one-dollar coins, the U.S. Mint started issuing the denomination again. See Eisenhower Dollars, MY COIN GUIDES, <http://eisenhowerdollarguide.com> (last visited Dec. 31, 2017). The Mint issued the Eisenhower dollar from 1971 to 1978, the Susan B. Anthony dollar from 1979 to 1981 and again in 1999, the American Silver Eagle dollar starting in 1986, and the Sacagawea dollar starting in 2000. All four designs (including the two modifications of the Sacagawea dollar) included "IN GOD WE TRUST" on the face. See American Silver Eagle Coins, MY COIN GUIDES, <http://silvereagleguide.com> (last visited Dec. 31, 2017); Eisenhower Dollars, *supra*; Sacagawea Dollars, MY COIN GUIDES, <http://sacagaweadollarguide.com> (last visited Dec. 31, 2017); Susan B. Anthony Dollars, MY COIN GUIDES, <http://susanbanthonydollar.org> (last visited Dec. 31, 2017).

¹⁰⁴ Presidential \$1 Coin Act of 2005, Pub. L. No. 109-145, 119 Stat. 2664, 2665 (2005) (codified at 31 U.S.C. §§ 5101, 5112).

¹⁰⁵ 151 CONG. REC. S13421-24 (daily ed. Nov. 18, 2005); 151 CONG. REC. H11447-50 (daily ed. Dec. 13, 2005).

¹⁰⁶ Presidential \$1 Coin Act of 2005, Pub. L. No. 109-145, 119 Stat. 2664 (giving December 22d as the date of enactment).

¹⁰⁷ 31 U.S.C. § 5112(n)(2)(B).

¹⁰⁸ *Id.* § 5112(n)(2)(A).

¹⁰⁹ Presidential \$1 Coin Act of 2005 § 102, 119 Stat. at 2666 ("The inscription of the year of minting or issuance of the coin and the inscriptions 'E Pluribus Unum' and 'In God We Trust' shall be edge-incused into the coin.").

passed by Congress and signed by President Bush specifically provided that *In God We Trust* be edge-incused on the new coin. But the statute went further; it was a paean to edge incusal. In its findings, Congress declared: “Placing inscriptions on the edge of coins, known as edge-incusing, is a hallmark of modern coinage and is common in large-volume production of coinage elsewhere in the world . . . but it has not been done on a large scale in United States coinage in recent years.”¹¹⁰ Congress found that edge incusing the mottos and emblems would allow for aesthetic improvements in the coins:

In order to revitalize the design of United States coinage and return circulating coinage to its position as not only a necessary means of exchange in commerce, but also as an object of aesthetic beauty in its own right, it is appropriate to move many of the mottos and emblems, the inscription of the year, and the so-called “mint marks” that currently appear on the 2 faces of each circulating coin to the edge of the coin, which would allow larger and more dramatic artwork on the coins¹¹¹

And Congress made a reference to an earlier age that was ironic, given the controversy that was about to unfold:

[This] would allow larger and more dramatic artwork on the coins reminiscent of the so-called “Golden Age of Coinage” in the United States, at the beginning of the Twentieth Century, initiated by President Theodore Roosevelt, with the assistance of noted sculptors and medallic artists James Earle Fraser and Augustus Saint-Gaudens.¹¹²

In the calm before the storm, after Congress passed the authorizing statute for the edge-incused Presidential dollars but before the public became aware of what had been done, President George W. Bush issued a proclamation regarding the national motto that spoke to its religious character:

On the 50th anniversary of our national motto, “In God We Trust,” we reflect on these words that guide millions of Americans, recognize the blessings of the Creator, and offer our thanks for His great gift of liberty.

From its earliest days, the United States has been a Nation of Faith. . . .

. . . .

As we commemorate the 50th anniversary of our national motto and remember with thanksgiving God’s mercies throughout our history, we recognize a divine plan that stands above all human plans and continue to seek His will.¹¹³

Once the public became aware of it, the edge-incused motto on the new coin proved controversial.¹¹⁴ It was claimed that moving the motto to the

¹¹⁰ *Id.* § 101(11), 119 Stat. at 2665.

¹¹¹ *Id.* § 101(10), 119 Stat. at 2665.

¹¹² *Id.*

¹¹³ 50th Anniversary of Our National Motto, “In God We Trust,” 2006, Proclamation No. 8038, 71 Fed. Reg. 43,343 (July 27, 2006).

¹¹⁴ *See Faith Under Fire: New U.S. Dollar Coins Hide “In God We Trust,”* WORLDNETDAILY (Nov. 27, 2006, 1:52 AM), <http://www.wnd.com/2006/11/39043/>.

coin edge would “trivialize the words,”¹¹⁵ and feared that moving the motto to the coin edge was a step on the path of removing it entirely.¹¹⁶ Moving *In God we trust* to the edge of the coin was seen as evidence of faith being under attack,¹¹⁷ part of an attempt to “phase God out of America.”¹¹⁸ The controversy over the new Presidential dollars became even more intense when the Mint accidentally produced and released a run of the new Presidential dollars without even the edge-incused *In God we trust* motto.¹¹⁹

On June 28, 2007, the floor discussion turned to an amendment by Congressman Roger Wicker of Mississippi to “restore to the face, or the obverse, of the dollar coin . . . that is being minted now, the words ‘In God We Trust’ and ‘E Pluribus Unum.’”¹²⁰ Congressman Jose Serrano of New York spoke in opposition to the amendment, not on the substance of having the mottos on the coin, but because he believed the Wicker amendment would not accomplish the end the sponsor wanted.¹²¹

On September 7, 2007, Congressman Dan Burton of Indiana spoke to the placement of the motto on coins, casting the question as part of a larger controversy over the role of religion and faith in society:

There are a lot of people in this country who have tried to get all symbols of religion, belief in God taken off of all public properties and coins and currency. Recently, there were thousands of coins minted without “In God We Trust” on them, and now they’re talking about putting “In God We Trust” in an obscure place on coins so that people can’t read it, right on the edge of the coin. I think this is—we’re moving in a very, very wrong direction.¹²²

Congressman Burton traced the conflict to the origins of the nation: “This country was formed with a firm reliance on God Almighty, and when we start taking God out of everything, as some people want to do, we run the

115 “*In God We Trust*” *Redesign for Dollar Coins*, CATH. NEWS AGENCY (Jan. 8, 2008, 2:11 PM), http://www.catholicnewsagency.com/news/in_god_we_trust_redesign_for_dollar_coins/ (“Critics had complained about the present placement of the motto, claiming its position on the outer edge of the coins would trivialize the words.”).

116 *Id.* (“Tony Perkins, the president of the Family Research Council, said . . . his group had been concerned that ‘moving “In God We Trust” off the face of our coins was just one step toward removing it altogether.’”).

117 *See Faith Under Fire: New U.S. Dollar Coins Hide “In God We Trust,” supra* note 114.

118 *In God We Trust Controversy on Dollar Coins Resolved*, SLIDESHARE, <http://www.slideshare.net/stereotypedeyew03/in-god-we-trust-controversy-on-dollar-coins-resolved> (last visited Sept. 12, 2017) (“Shortly after the release of the Presidential Dollar series, there was public controversy about the apparent omission of the ‘In God We Trust’ motto. Some widely circulated chain emails and articles stated that the motto had been removed as an attempt to ‘phase God out of America.’”).

119 153 CONG. REC. 17,956 (2007) (statement of Rep. Goode) (noting “numerous mint errors” based on “accounts that as many as 30,000 dollars do not have the etching on the side of In God We Trust or E Pluribus Unum.”).

120 *Id.* at 17,955 (statement of Rep. Wicker).

121 *Id.* at 17,956 (statement of Rep. Serrano) (“Your effect may be that you will go down in history as the gentleman who took In God We Trust off the coins and didn’t put in on anywhere else.”).

122 *Id.* at 23,969–70 (statement of Rep. Burton).

risk of having him turn his back on us.”¹²³ He warned of the consequences of taking the motto off currency:

Those who try to take God off of all things governmental, such as coinage or currency . . . are making a terrible mistake, in my opinion. . . .

Once you start turning your back on the good Lord, I think you are going to reap the whirlwind, and this is something this Nation cannot afford to do right now.¹²⁴

A corrective provision was included in the Consolidated Appropriations Act of 2008.¹²⁵ Heeding Congressman Burton’s warning, the nation avoided turning its back on the good Lord, and the motto *In God we trust* returned to the face of our coinage.

II. “FIRST, THE STATUTE MUST HAVE A SECULAR LEGISLATIVE PURPOSE . . .”: THE CONSTITUTIONALITY OF HAVING *IN GOD WE TRUST* ON OUR CURRENCY

Where the questions of religion are concerned people are guilty of every possible kind of insincerity and intellectual misdemeanor.

—Sigmund Freud¹²⁶

Given the clear religious tone of the history surrounding the placement, retention, and expansion of *In God we trust* on our currency, it is not surprising that the authorizing and mandating statutes have been the subject of constitutional challenges. The constitutionality of having *In God we trust* on our currency has been considered five times: in 1970 by the Ninth Circuit in *Aronow v. United States*,¹²⁷ in 1979 by the Fifth Circuit in *O’Hair v. Murray*,¹²⁸ in

¹²³ *Id.* at 23,970.

¹²⁴ *Id.*

¹²⁵ Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, § 623(a)(2), 121 Stat. 1844, 2018 (2007) (codified at 31 U.S.C. § 5112(n)(2)(F) (2012)) (“Inscription of ‘In God We Trust’.—The design on the obverse or the reverse shall bear the inscription ‘In God We Trust’.”).

¹²⁶ SIGMUND FREUD, *THE FUTURE OF AN ILLUSION*, 56–57 (Ernest Jones ed., W. D. Robson-Scott trans., Liveright Publ’g Corp. 1955) (1928).

¹²⁷ 432 F.2d 242 (9th Cir. 1970). The *Aronow* court found that the placement of *In God we trust* on currency had “nothing . . . to do with the establishment of religion,” that “[i]ts use is of a patriotic or ceremonial character and bears no true resemblance to a governmental sponsorship of a religious exercise,” and that the practice “is excluded from First Amendment significance because the motto has no theological or ritualistic impact,” but has only “inspirational quality.” *Id.* at 243–44 (citing PFEFFER, *supra* note 23, at 238; then citing S. REP. NO. 84-637 (1955), as reprinted in 1955 U.S.C.C.A.N. 2417, 2417; and then quoting H. REP. NO. 84-1959 (1956), as reprinted in 1956 U.S.C.C.A.N. 3720, 3720–21). The court noted that it also offers “spiritual and psychological value.” *Id.* at 244 (quoting H. REP. NO. 84-1959 (1956), as reprinted in 1956 U.S.C.C.A.N. 3720, 3720–21).

¹²⁸ 588 F.2d 1144 (5th Cir. 1979) (per curiam). The Fifth Circuit affirmed without analysis a Texas district court opinion rejecting challenges to the national motto and its placement on currency. *Id.* at 1144. The district court followed the Ninth Circuit’s findings in *Aronow* that the motto and its inclusion on currency “has nothing whatsoever to do with the establishment of religion,” and that

1996 by the Tenth Circuit in *Gaylor v. United States*,¹²⁹ in 2010 by the D.C. Circuit in *Kidd v. Obama*,¹³⁰ and in 2014 by the Second Circuit in *Newdow v. Peterson*.¹³¹ While none of the cases sustained the challenges to the placement of *In God we trust* on currency, their analyses were not uniform. One case was decided before *Lemon v. Kurtzman*.¹³² The four cases decided after *Lemon* found, among them, five different secular legislative purposes for the placement of *In God we trust* on currency.

A. Pre-Lemon: No Theological Impact

Writing the year before *Lemon*, the *Aronow* court first suggested that the motto and its inclusion on currency “is of a patriotic or ceremonial character,”¹³³ but then conceded that the terms “‘ceremonial’ and ‘patriotic’ may not be particularly apt words to describe the category of the national motto.”¹³⁴

Having apparently abandoned the patriotic or ceremonial justification, the *Aronow* court shifted to the argument that *In God we trust* “is excluded from First Amendment significance because the motto has no theological or ritualistic impact.”¹³⁵ The court cited only one authority for this proposition, and that authority does not support the assertion. The complete passage to which the *Aronow* court cited is:

the motto was “‘excluded from First Amendment significance because the motto has no theological or ritualistic impact.’” *O’Hair v. Blumenthal*, 462 F. Supp. 19, 19–20 (W.D. Tex. 1978) (quoting *Aronow*, 432 F.2d at 243).

¹²⁹ 74 F.3d 214, 216 (10th Cir. 1996). *Gaylor* addressed claims that the motto *In God we trust* and its inscription on currency violated the Establishment Clause. *Id.* The *Gaylor* court found “the statutes establishing the motto and requiring its reproduction on U.S. currency easily meet the requirements of the *Lemon* test.” *Id.* at 216 (citing *Lemon v. Kurtzman*, 403 U.S. 602 (1971)). The *Gaylor* court also evaluated the motto and currency statutes under the endorsement test, and determined the motto and currency statutes “fulfill the requirements of the endorsement test.” *Id.* at 217.

¹³⁰ 387 F. App’x 2 (D.C. Cir. 2010). *Kidd* affirmed that the placement of *In God We Trust* on currency did not violate the First Amendment, quoting *Aronow*, 432 F.2d at 243, in a parenthetical for the proposition that “[i]t is quite obvious that the national motto and slogan on coinage and currency . . . has nothing whatsoever to do with the establishment of religion.” *Id.*

¹³¹ 753 F.3d 105 (2d Cir. 2014). The *Newdow* plaintiffs challenged the statutory provisions that require the placement of the motto on the nation’s coins and currency based on the Establishment Clause, the Free Exercise Clause, and the Religious Freedom Restoration Act (“RFRA”). *Id.* at 106. The *Newdow* court declined to find either an Establishment Clause deficiency or a Free Exercise Clause and RFRA defect in the motto *In God We Trust* and its placement on currency. *Id.* at 108–10.

¹³² *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *Aronow*, 432 F.2d 242 (9th Cir. 1970), was decided the previous year.

¹³³ *Aronow*, 432 F.2d at 243 (“[T]he national motto and the slogan on coinage and currency ‘In God We Trust’ . . . is of a patriotic or ceremonial character and bears no true resemblance to a governmental sponsorship of a religious exercise.”). The court cited no authority for this assertion.

¹³⁴ *Id.* The concession was repeated by the district court in *O’Hair v. Blumenthal*. 462 F. Supp. 19, 20 (W.D. Tex. 1978) (quoting *Aronow*, 432 F.2d at 243).

¹³⁵ *Aronow*, 432 F.2d at 243 (citing PFEFFER, *supra* note 23, at 238). This rationale was repeated by the district court in *O’Hair v. Blumenthal*. 462 F. Supp. at 20 (quoting *Aronow*, 432 F.2d at 243).

Separation purists like Jefferson might have theoretic objections to these, but even he recognized that as a practical matter such ceremonial verbalizations could frequently not be avoided; both his Declaration of Independence and his Virginia Religious Freedom statute invoked God. The problems raised by such references are not intrinsic but extrinsic; that is, of themselves they are of no practical significance, but their importance lies in their facile and frequent use to justify practices that raise substantial and practical church-state problems.¹³⁶

The cited passage does not address whether *In God we trust* has theological or ritualistic impact.

Nor did the *Aronow* court gain any support from its uncritical reliance on the assertion that such religious references “could frequently not be avoided.”¹³⁷ If the assertion was structural, that the various writings could not have been done without the references to God, it was obviously incorrect.¹³⁸ If the assertion was political, that the various writings could not have been done without references to God because of pressure from the Christian majority to include them, it undermines, not supports, the assertion that the writings are constitutional.

Beyond the fact that the only authority cited by the *Aronow* court for the proposition that the placement of *In God we trust* on currency “is excluded from First Amendment significance because the motto has no theological or ritualistic impact”¹³⁹ doesn’t offer any support, the proposition is itself untrue. The motto has intrinsic religious content. If nothing else, the slogan *In God*

¹³⁶ *Aronow*, 432 F.2d at 243 n.2 (quoting PFEFFER, *supra* note 23, at 238).

¹³⁷ *Id.* (quoting PFEFFER, *supra* note 23, at 238).

¹³⁸ Pfeffer cites to the Declaration of Independence and the Virginia Religious Freedom statute. PFEFFER, *supra* note 23, at 238.

The Declaration of Independence contains four references to God: “Nature’s God,” “their Creator,” “the Supreme Judge of the world,” and “divine Providence.” THE DECLARATION OF INDEPENDENCE paras. 1–2, 5 (U.S. 1776). Each could have been written to be secular. “[T]he separate and equal station to which the Laws of Nature and of Nature’s God entitle them,” *id.* para. 1, could have been “the separate and equal station to which they are entitled.” “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights,” *id.* para. 2, could have been, “We hold these truths to be self-evident, that all men are created equal, that they are endowed with certain unalienable Rights.” “[A]ppealing to the Supreme Judge of the world for the rectitude of our intentions,” *id.* para. 5, could have been “appealing to the world for the rectitude of our intentions.” “[W]ith a firm reliance on the protection of divine Providence,” *id.*, could have been “with a firm reliance on our protection.”

The Virginia Act for Establishing Religious Freedom contains two references to God: “Almighty God” and the “Lord.” VA. CODE ANN. § 57-1 (2017) (“Act for religious freedom recited”). Both could have been written to be secular. “Whereas, Almighty God hath created the mind free,” *id.*, could have been “the mind hath been created free.” “[A]nd therefore are a departure from the plan of the holy author of our religion, who being Lord, both of body and mind yet chose not to propagate it by coercions on either, as was in his Almighty power to do,” *id.*, could have been “and therefore are a departure from the proper role of religion, which ought not be propagated by coercions on either body or mind.”

¹³⁹ *Aronow*, 432 F.2d at 243 (citing PFEFFER, *supra* note 23, at 238). This rationale was repeated by the district court in *O’Hair v. Blumenthal*, 462 F. Supp. at 20 (quoting *Aronow*, 432 F.2d at 243).

we trust asserts that God exists, a question not historically considered devoid of theological content. The existence of God was addressed by Aristotle in his *Metaphysics*,¹⁴⁰ and Plato in the *Laws*.¹⁴¹ It had enough theological weight to be one of the first parts of St. Thomas Aquinas's *Summa Theologica*.¹⁴² Some assert the existence of a single God.¹⁴³ Feuerbach wrote of God and humanity.¹⁴⁴ In the 1830s Abner Kneeland declared his non-belief and was jailed by the Commonwealth of Massachusetts for blasphemy;¹⁴⁵ sixty years later Robert Ingersoll declared his non-belief and was a celebrated author: "Is there a supernatural power—an arbitrary mind—an enthroned God—a supreme will that sways the tides and currents of the world—to which all causes bow? I do not deny. I do not know—but I do not believe."¹⁴⁶

It surely must be true that the question of whether God exists is not devoid of religious content. We are well to be reminded of St. Thomas Aquinas's answer to the question of whether any created intellect can see the essence of God:

Since everything is knowable according as it is actual, God, Who is pure act without any admixture of potentiality, is in Himself supremely knowable. But what is supremely knowable in itself, may not be knowable to a particu-

¹⁴⁰ ARISTOTLE, *METAPHYSICS*, bk. XI, at 326–40 (John H. M'Mahon trans., George Bell & Sons 1891) (addressing the existence of God).

¹⁴¹ PLATO, *LAWS*, bk. 10, at 299 (R. G. Bury trans., Harvard Univ. Press 1952) (addressing the belief in the gods).

¹⁴² 1 ST. THOMAS AQUINAS, *SUMMA THEOLOGICA* pt. I, q. 2, art. 3, at 13 (Fathers of the English Dominican Province trans., Benziger Bros. 1947) (“*I answer that*, The existence of God can be proved in five ways.”).

¹⁴³ *E.g.*, *Deuteronomy* 6:4 (New Int'l Version) (containing the “Shema Yisra’el” prayer: “Hear, O Israel: The Lord is our God, the Lord is One.”); THE QUR’AN, Surah 112:1–4, (Abdullah Yusuf Ali trans., Tahrike Tarsile Qur’an, Inc. 22d ed. 2007) (“Al Ikhlas, or Purity (of Faith). In the name of Allah, Most Gracious, Most Merciful. 1. Say: He is Allah, the One and Only; 2. Allah, the Eternal, Absolute; 3. He begets not, nor is He begotten; 4. And there is none like unto Him.”); SOUTHERN BAPTIST CONVENTION, *THE BAPTIST FAITH AND MESSAGE* (2000), <http://www.sbc.net/bfm2000/bfm2000.asp> (“II. God. There is one and only one living and true God.”).

¹⁴⁴ *See, e.g.*, LUDWIG FEUERBACH, *THE ESSENCE OF CHRISTIANITY* 270 (Marian Evans trans., Trübner, & Co. 3d ed. 1881) (“The necessary turning-point of history is therefore the open confession, that the consciousness of God is nothing else than the consciousness of the species”); *id.* at x (“God is man, man is God”); *id.* at xii (“[R]eligion takes the apparent, the superficial in Nature and humanity for the essential, and hence conceives their true essence as a separate, special existence.”).

¹⁴⁵ *See generally* STEPHAN PAPA, *THE LAST MAN JAILED FOR BLASPHEMY* (1998); ABNER KNEELAND, *AN INTRODUCTION TO THE DEFENSE OF ABNER KNEELAND, CHARGED WITH BLASPHEMY; BEFORE THE MUNICIPAL COURT, IN BOSTON MASS. AT THE JANUARY TERM, IN 1834*, at 37 (1834) (“To the Editor of the Trumpet. . . . Universalists believe in a god which I do not; but believe that their god, with all his moral attributes, (aside from nature itself,) is nothing more than a chimera of their own imagination.”).

¹⁴⁶ 4 ROBERT G. INGERSOLL, *Why I Am an Agnostic.*, in *THE WORKS OF ROBERT G. INGERSOLL* 5, 63 (The Dresden Publ’g Co. 1902).

lar intellect, on account of the excess of the intelligible object above the intellect; as, for example, the sun, which is supremely visible, cannot be seen by the bat by reason of its excess of light.¹⁴⁷

Beyond the foundational theological assertion that God exists, the motto *In God we trust* has further theological content on several levels. Because the motto is *In God we trust*, and not *In gods we trust*, it asserts the existence of a unitary god, not many gods. Because the motto is *In God we trust*, and not *In god we trust*, it asserts the existence of a particular, in this case a Christian, god.¹⁴⁸ Because the motto is *In God we trust*, and not, for example, *In God we believe*, it asserts the existence of a God in which one might trust; presumably trust to respond to the human condition, to prayer, or to the need for intervention.¹⁴⁹ The motto thus implicitly rejects the deist belief in a divine watchmaker who, having created the universe, stepped back.¹⁵⁰ Finally, because the motto is *In God we trust*, and not *In God some trust*, it suggests unanimity—a God in whom *we* trust—where increasingly none exists.

B. Post-Lemon: Secular Purpose

The *Aronow* assertion that *In God we trust* has no theological impact was in error; it is also no longer the relevant test. A year following *Aronow*, the Supreme Court decided *Lemon*, and the analysis shifted. *Lemon* established a

¹⁴⁷ AQUINAS, *supra* note 142, pt. 1, q. 12, art. 1, at 49.

¹⁴⁸ By capitalizing “God,” the statutes indicate it is a proper noun, referring to a specific god. See Mignon Fogarty, *Do You Capitalize “God”?*, QUICKANDDIRTYTIPS.COM (Apr. 21, 2011), <http://www.quickanddirtytips.com/education/grammar/do-you-capitalize-god> (“The name of any specific deity is capitalized just like any other name, so when ‘God’ is used to refer to ‘the one God,’ (in other words, in any monotheistic religion) it is capitalized.”). Interestingly, and for no apparent grammatical reason, some authorities provide that the devil is not capitalized even when used as a proper noun. See, e.g., JANE STRAUS & LESTER KAUFMAN, *THE BLUE BOOK OF GRAMMAR AND PUNCTUATION* 50 (Tom Stern ed., 11th ed. 2014) (“Do not capitalize . . . the devil . . .”). But see *Capitalization Rules*, LETTERS LIBRARY, <http://letterslibrary.com/writing-tips/capitalization-rules/> (last visited Sept. 12, 2017) (“Capitalize all names for the Devil.”). The capitalization of the motto varies. The statute establishing the motto specifies the “I” and “G” as capital letters: “In God we trust.” 36 U.S.C. § 302 (2012). The statutes requiring the motto on coins and bills specify all initial capital letters: “In God We Trust.” 31 U.S.C. §§ 5112(d)(1), 5114(b). Existing currency of all denominations has the motto in all capital letters: “IN GOD WE TRUST.”

¹⁴⁹ See *Hall v. Bradshaw*, 630 F.2d 1018, 1022 n.1 (4th Cir., 1980) (explaining that the “Motorist’s Prayer” on North Carolina’s state map potentially evoked a “narrowly confined intercessory supplication for deity’s private attention” and intervention: “While the prayer at issue might at first blush seem utterly innocuous, there are doubtless many even within the main theological stream of the dominant religious culture of the affected populace who are at least made uncomfortable, and perhaps are positively offended, by the sort of narrowly confined intercessory supplication for deity’s private attention that it represents.”).

¹⁵⁰ See Thomas Paine, *Of the Religion of Deism Compared with the Christian Religion, and the Superiority of the Former over the Latter*, *THE PROSPECT; OR VIEW OF THE MORAL WORLD*, 1804, reprinted in 4 *THE WRITINGS OF THOMAS PAINE* 315, 317 (Moncure Daniel Conway ed., 1908) (“When we see a watch, we have as positive evidence of the existence of a watchmaker, as if we saw him; and in like manner the creation is evidence to our reason and our senses of the existence of a Creator.”).

three-part test to evaluate governmental actions challenged on Establishment Clause grounds: “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster ‘an excessive government entanglement with religion.’”¹⁵¹

Focusing on the first *Lemon* prong, that the challenged governmental action must have a secular purpose, we need to consider how the required secular purpose is to be identified. Here, the analysis of Professor Andrew Koppelman is helpful.¹⁵² He starts with the justification behind the secular purpose requirement: “What the state may not do—what the doctrine properly forbids it to do—is declare any particular religious doctrine to be the true one, or enact laws that clearly imply such a declaration of religious truth.”¹⁵³ This he bases on the well-settled principles set forth in *Epperson v. Arkansas*:

Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.¹⁵⁴

Koppelman identifies four principle objections to the secular purpose requirement, two of which relate to our discussion.

The first is “the rubber stamp objection,” which “holds that nearly anything can satisfy the secular purpose requirement, because a secular rationale can be imagined for almost any law.”¹⁵⁵ Koppelman uses Chief Justice Rehnquist’s formulation in *Wallace v. Jaffree* to illustrate the objection:

If the purpose prong is intended to void those aids to sectarian institutions accompanied by a stated legislative purpose to aid religion, the prong will condemn nothing so long as the legislature utters a secular purpose and says nothing about aiding religion. Thus the constitutionality of a statute may depend upon what the legislators put into the legislative history and, more importantly, what they leave out.¹⁵⁶

The second is “the evanescence objection,” which “claims that the ‘purpose’ that the rule seeks either does not exist or is not knowable by judges.”¹⁵⁷ To illustrate the objection, Koppelman uses Justice Scalia:

¹⁵¹ *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (citation omitted) (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 674 (1970)).

¹⁵² Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87 (2002).

¹⁵³ *Id.* at 88.

¹⁵⁴ *Epperson v. Arkansas*, 393 U.S. 97, 103–04 (1968).

¹⁵⁵ Koppelman, *supra* note 152, at 88 (emphasis omitted).

¹⁵⁶ *Wallace v. Jaffree*, 472 U.S. 38, 108 (1985) (Rehnquist, J., dissenting).

¹⁵⁷ Koppelman, *supra* note 152, at 88 (emphasis omitted). The third and fourth objections noted by Koppelman are “the participation objection” which “argues that the rule makes religious people into second-class citizens by denying them the right to participate in the legislative process,” and

Justice Antonin Scalia has been the most forceful advocate of the second objection, which I have called the evanescence objection. He argues that the legislative purpose upon which the prong depends either does not exist or is not knowable by judges, because “discerning the subjective motivation of those enacting the statute is, to be honest, almost always an impossible task.”¹⁵⁸

Koppelman meets the rubber stamp objection and the evanescence objection in part by advocating an objective secular purpose analysis rather than a subjective analysis. “The answer to the rubber stamp and evanescence objections,” he writes, “is that what government says is sometimes obvious on the face of the statute.”¹⁵⁹ This type of case makes a subjective inquiry unnecessary:

Even without looking to the intent of those passing a law or the perceptions of those subject to it, sometimes the meaning of a state law is obvious. It cannot be inappropriate for judges to recognize what is obvious to everyone else. . . . When the state argues that its law reflects a secular purpose, the appropriate response will sometimes be neither psychoanalysis of the legislature nor a survey of public opinion; laughter will suffice.¹⁶⁰

Koppelman does not propose a narrow objective inquiry; he would let the reviewing court consider the context in which the statute was passed:

The plausibility of the state’s proffered secular justification is context-dependent. The objective approach to legislative purpose does not confine the Court’s attention to the four corners of the statute. The context in which the law was enacted is an objective fact about it, and one that the court may properly take into account in discerning the law’s purpose.¹⁶¹

What is not clear is whether Koppelman’s broad objective inquiry would include as permitted context what we might term the legislative history of the challenged statute, such as the statements of legislators and the executive accompanying passage of the statute into law. Apparently Professor Koppelman would not include the legislative history in that broader contextual analysis. Referring to *Wallace* as “the least defensible of the secular purpose decisions,” he observes: “This is the secular purpose opinion that relied most heavily upon the legislative history of the law in question. I have argued that it is never appropriate to rely on such history to find a lack of secular purpose”¹⁶²

“the callous indifference objection” which “holds that the secular purpose requirement . . . would forbid the humane accommodation of religious dissenters” *Id.* at 88–89 (emphases omitted).

¹⁵⁸ *Id.* at 99 (quoting *Edwards v. Aguillard*, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting)).

¹⁵⁹ *Id.* at 113.

¹⁶⁰ *Id.* at 114–15 (noting that Professor Charles Black “pointed out long ago that the proper response to the solemn assertion that segregated facilities did not declare the inferiority of blacks was ‘one of the sovereign prerogatives of philosophers—that of laughter’” (quoting Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 *YALE L.J.* 421, 424 (1960))).

¹⁶¹ *Id.* at 147.

¹⁶² *Id.* at 147–48.

It may be true that a subjective analysis of a challenged statute will rarely yield information upon which a finding of unconstitutionality under the secular purpose test might be based. Chief Justice Rehnquist was probably correct that legislatures have become more clever in masking their improper motives, that in enacting statutes to aid religion the typical legislature “utters a secular purpose and says nothing about aiding religion.”¹⁶³ For the same reason, Justice Scalia was probably correct that “discerning the subjective motivation of those enacting the statute is, to be honest, almost always an impossible task.”¹⁶⁴ And Professor Koppelman is probably correct that “sometimes the meaning of a state law is obvious.”¹⁶⁵ But to say that legislatures have become more clever in masking their actual motivations, to say that it is almost always impossible to ascertain a legislature’s actual purpose, to say that it is sometimes clear what the meaning of a statute is, is not to say that it is always so.¹⁶⁶ Indeed, there is a strong case to be made that the administrative and legislative histories behind the placement of *In God we trust* on currency—the origins during the Rebellion, the First Omission, the expansion during the McCarthy era, and the Second Omission—provide an example of when the subjective purpose of administrators and legislators can be reliably ascertained.

In that admittedly rare case where the subjective purpose of a legislature enacting a challenged statute can be reliably ascertained, should it be sufficient for a finding of unconstitutionality? A hypothetical helps illustrate the issue. Suppose an extreme anti-Muslim state legislator wants to take a stand against “radical Islamic terrorism.” Acting on his illogical conflation of observant Muslims and terrorists, and his mistaken belief that the Tennessee coneflower (*echinacea tennesseensis*) is necessary for the Muslim celebration of the birth of the Prophet Muhammad, Mawlid al-Nabi,¹⁶⁷ he secures the passage of a law to

¹⁶³ *Wallace v. Jaffree*, 472 U.S. 38, 108 (1985) (Rehnquist, J., dissenting).

¹⁶⁴ *Edwards v. Aguillard*, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting).

¹⁶⁵ Koppelman, *supra* note 152, at 114. It might be noted that there are examples where the meaning, that is, the effect, of a statute is quite clear even when the purpose, that is, the reason for the enactment, is not.

¹⁶⁶ The clumsy maneuvering of two Kentucky counties over the display of the Ten Commandments, described in *McCreary County v. ACLU*, 545 U.S. 844, 856–57 (2005), illustrates the point:

The ACLU moved to supplement the preliminary injunction to enjoin the Counties’ third display, and the Counties responded with several explanations for the new version, including desires “to demonstrate that the Ten Commandments were part of the foundation of American Law and Government” and “to educate the citizens of the county regarding some of the documents that played a significant role in the foundation of our system of law and government.” The court, however, took the objective of proclaiming the Commandments’ foundational value as “a religious, rather than secular, purpose” . . . and found that the assertion that the Counties’ broader educational goals are secular “crumble[s] . . . upon an examination of the history of this litigation.”

Id. (footnote omitted) (quoting *ACLU v. McCreary Cty.*, 14 F. Supp. 2d 845, 848–49 (E.D. Ky. 2001)).

¹⁶⁷ This would have been incorrect both because Mawlid al-Nabi is not a required holiday for Muslims. See Shaykh Muhammad Saalih al-Munajjid, *Mawlid al-Nabi (the Prophet’s Birthday)*, ISLAM QUESTION

prohibit the cultivation of the Tennessee coneflower within, and the importation of the flower into, his state. Would such a statute survive or fail the first prong of *Lemon*, that “the statute must have a secular legislative purpose”?¹⁶⁸

What if the legislator is candid about the reasons for the statute, and includes “whereas” clauses in the legislation that make clear its anti-Muslim rationale,¹⁶⁹ and the rationale is repeated without dissent in the legislative debate and the Governor’s signing message. Should the statute survive or fail the first prong of *Lemon*, that “the statute must have a secular legislative purpose”?¹⁷⁰ If one looked objectively at the statute, finding its purpose only in terms of what it did—banning the *echinacea tennesseensis*—and the context contained in the four corners of the enactment, it should be held unconstitutional. It is true that the statute has no effect on religion since the sponsor, the legislature, and the Governor are mistaken in their belief that the Tennessee coneflower is essential for the Muslim observance of Mawlid al-Nabi. The effect of the statute is simply to add another item to the controlled dangerous substance list, which the state has broad police powers to do, absent an improper motive. But that goes to the second prong of *Lemon*, that the challenged statute’s “principal or primary effect must be one that neither advances nor inhibits religion.”¹⁷¹ Even though they are acting on a factually incorrect assumption about the role of the Tennessee coneflower in the Muslim observance of Mawlid al-Nabi, the action is still taken with an improper purpose. And the “whereas” statements in the statute surely evidence an improper purpose.

AND ANSWER (July 6, 1998), <https://islamqa.info/en/249> (“There is nothing in the Qur’aan to say that we should celebrate the Mawlid or birthday of the Prophet (peace and blessings of Allaah be upon him).”). It would also appear to be incorrect because the Tennessee coneflower, being indigenous to only a small part of Tennessee, would not appear to have any special significance in the Muslim faith. *Tennessee Coneflower—No Longer Endangered*, NATURE CONSERVANCY, <https://www.nature.org/ourinitiatives/regions/northamerica/unitedstates/tennessee/explore/tennessee-coneflower.xml> (last visited Dec. 31, 2017) (“The Tennessee coneflower is only found in cedar glades and barrens of Middle Tennessee.”).

¹⁶⁸ *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). Assume for our purposes that we avoid any standing issue by having the statute challenged by a Muslim resident of the state, an American citizen by birth, who has for many years engaged in the business of raising, importing, and selling beautiful flowers, including the white flag iris.

¹⁶⁹ For example:
 WHEREAS, radical Islamic terrorism poses a clear and present danger to the people of this State;
 WHEREAS, Islam’s goal is the destruction of Western civilization from within, and Islam is a cancer on our nation that needs to be cut out;
 WHEREAS, the jihadist network does exist in this State, and Muslim Americans who subscribe to Islam are just as bad as ISIS;
 WHEREAS, Islam and thus radical Islamic terrorism are fostered by Mawlid al-Nabi, the Muslim celebration of the birth of the so-called Prophet Muhammad;
 AND WHEREAS, the celebration of Mawlid al-Nabi is impossible without the presence of the Tennessee coneflower (*echinacea tennesseensis*).

¹⁷⁰ *Lemon*, 403 U.S. at 612.

¹⁷¹ *Id.*

What if the legislator is clever about the reasons for the statute, and remains silent about his anti-Muslim rationale? If one looks objectively at the statute finding its purpose only in terms of what it does—ban the *echinacea tennesseensis*—and the four corners of the statute, it has nothing to do with religion. The effect of the statute is simply to add another item to the controlled dangerous substance list, which the state has broad police powers to do. Presumably, the statute would be held constitutional.

But what of the third possibility, where the legislator is silent about the reasons for the statute in the statute itself, but is candid in the discussions surrounding the enactment? Assume the state representative is open about his motivations, but instead of inserting “whereas” clauses to explain his purpose, he relies upon a speech on the floor of the legislature to accomplish the same end. Further assume that his rationale is repeated in the floor debate, without opposition, and in the Governor’s signing statement. Here the evidence of an improper purpose has shifted from the four corners of the statute to the legislative history. Again, the statute does not run afoul of *Lemon*’s second prong, since it was based on an incorrect understanding of the role of the Tennessee coneflower in the Muslim celebration of Mawlid al-Nabi. But if one purpose of the Establishment Clause is to avoid civil strife based on religious belief, then such a bigoted piece of legislation ought not withstand constitutional scrutiny merely because its proponents missed their aim. Surely the enactment itself does sufficient damage to the nation that it ought not stand. A subjective review that included legislative history would achieve the proper result in our third hypothetical, where an objective review might not.

Correctly conceived, the secular purpose test of *Lemon* ought to include two reviews. The first should be: Is the legislative purpose behind the challenged statute fairly ascertainable, and if it is, is it secular? Where the legislative purpose cannot be fairly ascertained, or where the subjective review indicates a secular purpose, the inquiry should proceed to the second review. Where the legislative purpose can be fairly ascertained, and where that purpose is non-secular, the statute should be declared unconstitutional. This inquiry is whether a secular purpose existed as of the time of the governmental action, not whether it can be created as a *post hoc* rationalization of what the government might have thought if they had thought of it.¹⁷² Clearly, because of evolving legislative powers of mendacity and legitimate questions

¹⁷² See *id.* at 612. In reviewing the Pennsylvania and Rhode Island statutes, the *Lemon* court was clearly looking at the contemporaneous legislative record, not a *post hoc* rationalization of legislative intent: Inquiry into the legislative purposes of the Pennsylvania and Rhode Island statutes affords no basis for a conclusion that the legislative intent was to advance religion. On the contrary, the statutes themselves clearly state that they are intended to enhance the quality of the secular education in all schools covered by the compulsory attendance laws. There is no reason to believe the legislatures meant anything else. . . . [W]e find nothing here that undermines the stated legislative intent; it must therefore be accorded appropriate deference.

Id. at 613.

as to how often legislative purpose can fairly be identified, this first review would rarely be dispositive. Nevertheless, it ought to be undertaken.

The second review in the *Lemon* secular purpose test should be: Is an objective legislative purpose fairly ascertainable from the four corners of the statute and the context in which the legislature acted? This review has three parts: (1) Is the asserted purpose in fact secular, (2) is the asserted secular purpose of the action fairly indicated by the language and context of the statute, and (3) is the connection between the action taken and the asserted secular purpose plausible?

A hypothetical helps illustrate the second review. Suppose the Iowa legislature passes a bill providing for a sign at each federal highway entrance into the state proclaiming *Jesus is the son of the Living God*. When the statute is challenged, it proves impossible to fairly ascertain a subjective legislative purpose because the measure is introduced without any legislative findings, is sent to the floor without any committee consideration, is voted upon without discussion, is passed by both houses by narrow margins, and is signed by the Governor without comment. When challenged, Iowa defends the measure by claiming that its secular purpose is to honor Iowa's son, President Herbert Hoover.

The first part of the objective review asks if the asserted purpose is secular. Here, the asserted purpose for the statute—honoring President Hoover—is clearly secular and appropriate for government action. The second part of the objective review asks if the asserted secular purpose of the statute is fairly indicated by its language and context. Here, there is no indication of the asserted secular purpose (or any purpose) in the language or context of the statute. The proponents should have been more mendacious. The third part of the objective review asks if the connection between the statute and the asserted secular purpose is plausible. Here, the question is how the placement of *Jesus is the son of the Living God* on billboards advances the secular purpose of honoring President Hoover. Even given a high degree of deference for legislative findings, of which there were none in our hypothetical, it must be true that this statute would not withstand judicial scrutiny because there is absolutely no connection between the challenged action and the asserted secular purpose.¹⁷³

¹⁷³ See Micah Schwartzman, *What If Religion Is Not Special?*, 79 U. CHI. L. REV. 1351, 1360–61 (2012) (“[T]he government’s proffered secular purpose cannot be a false rationalization for the law. No court has recognized a sham secular purpose as satisfying the demands of the Establishment Clause.” (first citing *McCreary Cty. v. ACLU*, 545 U.S. 844, 864 (2005) (“[T]he secular purpose required has to be genuine, not a sham”); then citing *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) (“When a governmental entity professes a secular purpose for an arguably religious policy, the government’s characterization is . . . entitled to some deference. But it is nonetheless the duty of the courts to ‘distinguis[h] a sham secular purpose from a sincere one.’” (second alteration in original))). The cited sources stand for the proposition that courts *shouldn’t* recognize sham secular purposes as satisfying the demands of the Establishment Clause, not the assertion that they *haven’t*. See, e.g., *Gaylor v. United States*, 74 F.3d 214, 216 (10th Cir. 1996) (asserting that *In*

The third part of the inquiry asks only if a link between the governmental action and the secular purpose is plausibly asserted, not if it is true. Reviewing courts have been less than rigorous on this point. In *Hall v. Bradshaw*, the Fourth Circuit struck down a “Motorist’s Prayer” printed by the State of North Carolina on roadmaps:

Our heavenly Father, we ask this day a particular blessing as we take the wheel of our car. Grant us safe passage through all the perils of travel; shelter those who accompany us and protect us from harm by Thy mercy; steady our hands and quicken our eye that we may never take another’s life; guide us to our destination safely, confident in the knowledge that Thy blessings go with us through darkness and light . . . sunshine and shower . . . forever and ever. Amen.¹⁷⁴

North Carolina asserted, and the district court found, “that the purpose of the prayer was to promote highway safety, which is secular.”¹⁷⁵ The *Hall* court correctly concluded “that the state action here does not reflect a clearly secular purpose but instead impermissibly sponsors religious activity.”¹⁷⁶ But the court seemingly left open the possibility that a state-sponsored prayer *could* result in safer conditions on North Carolina roads:

The district court accepted defendant’s contention that the prayer promoted safety, which is a legitimate secular purpose. A prayer, however, is undeniably religious and has, by its nature, both a religious purpose and effect. While we agree that the prayer may foster the state’s legitimate concern for safety of motorists, the state cannot escape the proscriptions of the Establishment Clause merely by identifying a beneficial secular purpose. The inquiry goes beyond this. . . . A prayer, because it is religious, does advance religion, and the limited nature of the encroachment does not free the state from the limitations of the Establishment Clause.¹⁷⁷

How this might have worked, neither the district court nor the Fourth Circuit explained.

The post-*Lemon* cases on the placement of *In God we trust* on currency identified five secular purposes behind the challenged governmental action. It is illuminating to evaluate these asserted secular purposes, using both the subjective and objective reviews.

God we trust serves secular purpose of fostering patriotism); *O’Hair v. Blumenthal*, 462 F. Supp. 19, 20 (W.D. Tex. 1978) (finding that *In God we trust* on currency “served a secular ceremonial purpose in the obviously secular function of providing a medium of exchange.”).

¹⁷⁴ *Hall v. Bradshaw*, 630 F.2d 1018, 1019 (4th Cir. 1980) (citation omitted).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 1020.

¹⁷⁷ *Id.* at 1020–21.

C. First Secular Purpose: Formalizing Our Medium of Exchange

The first secular purpose divined by the post-*Lemon* courts related to the role of currency. This was advanced in *O'Hair* and *Gaylor*. Looking to *Aronow*, the *O'Hair* district court found “that the primary purpose of the slogan was secular; it served a secular ceremonial purpose in the obviously secular function of providing a medium of exchange.”¹⁷⁸ The *Gaylor* court seemed to be getting at the same concept when, citing *O'Hair*, it found a secular purpose in that the placement of *In God we trust* on currency “formalizes our medium of exchange.”¹⁷⁹

As to the subjective review, neither the *O'Hair* court nor the *Gaylor* court offered any evidence at all, much less any evidence from the contemporaneous historical record, that the administrative and legislative actors who put *In God we trust* on our national currency did so to serve a secular ceremonial purpose related to the secular function of providing a medium of exchange, or to formalize our medium of exchange.

As to the objective review, the first part asks if the asserted purpose is secular. Here, while it is correct that for a nation to provide a medium of exchange is a secular function of government, the “secular ceremonial purpose” of including *In God we trust* on that medium of exchange is far from clear, especially since the *O'Hair* court conceded, like the *Aronow* court, that “‘ceremonial’ and ‘patriotic’ may not be particularly apt words to describe the category of the national motto.”¹⁸⁰ While one might concede that the purpose served by having the motto on currency is “ceremonial,” in that the purpose is not functional, the *O'Hair* court did not explain why the inclusion of *In God we trust* is a secular ceremonial purpose and not a religious ceremonial purpose, or offer any support for its secular purpose finding, other than a citation to *Aronow*.¹⁸¹

The second part of the objective review asks if the asserted secular purpose of the statute is fairly indicated by its language and context. Here, the *O'Hair* court was silent as to whether the asserted secular purpose of serving a secular ceremonial purpose relating to the secular function of providing a medium of exchange is fairly indicated by the language and context of the statute.

The third part of the objective review asks if the connection between the statute and the secular purpose asserted is plausible. Here, the *O'Hair* court

¹⁷⁸ *O'Hair*, 462 F. Supp. at 20 (citing *Aronow v. United States*, 432 F.2d 242, 243 (9th Cir. 1970)). Other than using the word “secular” three times in the same sentence, this assertion of secular purpose is truly muddled.

¹⁷⁹ *Gaylor v. United States*, 74 F.3d 214, 216 (10th Cir. 1996) (citing *O'Hair*, 462 F. Supp. at 20).

¹⁸⁰ See *O'Hair*, 462 F. Supp. at 20 (quoting *Aronow*, 432 F.2d at 243).

¹⁸¹ *Id.* at 19–20 (agreeing with the *Aronow* court that the motto does not violate the Establishment Clause).

did not explain how placing *In God we trust* could be plausibly associated with serving a secular ceremonial purpose relating to the secular function of providing a medium of exchange.¹⁸²

As to the related *Gaylor* claim that the motto “formalizes our medium of exchange,” the objective review is equally unresponsive. The first part of the objective review asks if the asserted purpose is secular. Here, again, it is difficult to know what the court means. The Oxford Dictionary defines “formalize” to mean the act of giving something legal or formal status.¹⁸³ Surely the *Gaylor* court was not claiming that the inclusion of the motto was necessary to give the nation’s currency legal status. If by “formalizes our medium of exchange,” the court meant that the inclusion of *In God we trust* on currency makes the currency more formal—like wearing a tie or nicely polished shoes—the reference is simply curious.¹⁸⁴

The second part of the objective review asks if the asserted secular purpose of the statute is fairly indicated by its language and context. Here, the *Gaylor* court was silent as to whether the asserted secular purpose of formalizing our medium of exchange is fairly indicated by the language and context of the statute.

The third part of the objective review asks if the connection between the statute and the secular purpose asserted is plausible. Here, the *Gaylor* court did not explain how placing *In God we trust* could be plausibly associated with formalizing our medium of exchange.

D. Second Secular Purpose: Fostering Patriotism

The second secular purpose divined by the post-*Lemon* courts was that having *In God we trust* on currency “fosters patriotism.”¹⁸⁵ This was advanced in *Gaylor*.

As to the subjective review, neither the *Gaylor* court nor the *Aronow* court to which it cited offered any support at all, much less any evidence from the contemporaneous historical record, that the administrative and legislative actors who put *In God we trust* on our national currency did so to foster patriotism. There are scattered references to patriotism in the historical record, but they are few in number and are either cast in terms of “Christian patriotism”¹⁸⁶ or

¹⁸² *Id.* at 20 (asserting only that *In God we trust* has a “secular ceremonial purpose”).

¹⁸³ *Formalize*, OXFORD DICTIONARIES, <https://en.oxforddictionaries.com/definition/formalize> (last visited Oct. 2, 2017) (“Give (something) legal or formal status.”).

¹⁸⁴ *Gaylor*, 74 F.3d at 216 (citing *O’Hair*, 462 F. Supp. at 20).

¹⁸⁵ *Id.* at 216 (citing *Aronow*, 432 F.2d at 243).

¹⁸⁶ H. COMM. ON COINAGE, WEIGHTS, AND MEASURES, 60th CONG., TO RESTORE THE MOTTO “IN GOD WE TRUST” TO THE COINS OF THE UNITED STATES 2 (1908) (submitted by Rep. William B. McKinley). The report stated:

Your subcommittee is unanimous in the belief that as a Christian nation we should restore this motto . . . “as an outward and visible form of the inward and spiritual grace,” which

the patriotism of Christians,¹⁸⁷ or seemingly distinguish *In God we trust* from patriotic slogans.¹⁸⁸

As to the objective review, the first part asks if the asserted purpose is secular. Here, the asserted purpose of fostering patriotism is secular. The second part of the objective review asks if the asserted secular purpose of the statute is fairly indicated by its language and context. Here, as to whether the asserted secular purpose of fostering patriotism is fairly indicated by the language and context of the statute, the *Gaylor* court is silent.

The third part of the objective review asks if the connection between the statute and the secular purpose asserted is plausible. Here, neither the *Gaylor* court nor the *Aronow* court to which it cited explain how the inclusion of *In God we trust* on currency fosters patriotism. The *Gaylor* court offers no hint other than a reference to the *Aronow* opinion, in which, it should be remembered, the court conceded that “‘ceremonial’ and ‘patriotic’ may not be particularly apt words to describe the category of the national motto.”¹⁸⁹ Neither *Aronow* nor *Gaylor* offered any support for the proposition other than the bare citation in *Gaylor* to the unsupported assertion in *Aronow*.

E. Third Secular Purpose: Expressing Confidence in the Future

The third secular purpose divined by the post-*Lemon* courts was that having *In God we trust* on currency “expresses confidence in the future.”¹⁹⁰ This was advanced in *Gaylor* and *Newdow*.

should possess and inspire American citizenship, and as an evidence to all the nations of the world that the best and only reliance for the perpetuation of the republican institution is upon a Christian patriotism, which, recognizing the universal fatherhood of God, appeals to the universal brotherhood of man as the source of the authority and power of all just government.

Id.

¹⁸⁷ N. W. Merrill, Letter to the Editor, *Like the Atheism of France in 1790*, 30 CHRISTIAN HERALD 1124 (1907), as reprinted in 42 CONG. REC. 513 app. A. at 513 (1908) (“The dropping from our coins of the motto ‘In God we trust’ appeals to every Christian who has a spark of patriotism left in his heart.”).

¹⁸⁸ Charles B. Thompson, Letter to the Editor, *It Expresses the Nation’s Faith*, 30 CHRISTIAN HERALD 1124 (1907), as reprinted in 42 CONG. REC. 513 app. A. at 514 (“A motto expressive of patriotism has no more right upon our coins than one expressive of the faith without which a nation would presently find itself in the dust. Old Glory is not too good for everyday use; neither is the grand old motto which has so long publicly expressed the highest faith of the great American people.”).

¹⁸⁹ *Aronow*, 432 F.2d at 243. This concession was repeated by the district court in *O’Hair*. *O’Hair*, 462 F. Supp. at 20 (quoting *Aronow*, 432 F.2d at 243).

¹⁹⁰ *Gaylor*, 74 F.3d at 216 (citing *Lynch v. Donnelly*, 465 U.S. 668, 692–93 (1984) (O’Connor, J., concurring)). Similarly, the *Newdow* court found a secular purpose because “[g]overnmental] acknowledgements [of religion], . . . and the printing of ‘In God We Trust’ on our coins serve the secular purpose of . . . expressing confidence in the future” *Newdow v. Peterson*, 753 F.3d 105, 108 (2d Cir. 2014) (first two alterations in original) (quoting *County of Allegheny v. ACLU*, 492 U.S. 573, 625 (1989) (O’Connor, J., concurring in part and concurring in the judgment)).

As to the subjective review, neither the *Gaylor* court nor the *Newdow* court offered any support at all, much less any evidence from the contemporaneous historical record, that the administrative and legislative actors who put *In God we trust* on our national currency did so to express confidence in the future.

As to the objective review, the first part asks if the asserted purpose is secular. Here, the asserted purpose of expressing confidence in the future could be secular, unless our confidence in the future is based on a particular religious belief. Such a particular religious belief which produces confidence in the future might be indicated by a slogan such as *In God we trust*.

The second part of the objective review asks if the asserted secular purpose of the statute is fairly indicated by its language and context. Here, as to whether the asserted secular purpose of expressing confidence in the future is fairly indicated by the language and context of the statute, the *Gaylor* and *Newdow* courts are silent.

The third part of the objective review asks if the connection between the statute and the secular purpose asserted is plausible. Here, neither the *Gaylor* court nor the *Newdow* court explained how the inclusion of *In God we trust* on currency “expresses confidence in the future.” The *Gaylor* court offered no hint other than a reference to the *Lynch* opinion.¹⁹¹ In *Lynch*, Justice O’Connor was equally unclear, asserting without explanation or support not only that the motto expresses confidence in the future, but that it is of a class of religious statements that are the *only* way in which such expressions are reasonably possible.¹⁹² It simply is not true that the statement *In God we trust* and similar religious assertions are the only way reasonably possible in our culture in which to express confidence in the future. Take, for example, Ralph Waldo Emerson’s declaration:

Men are made up of potencies. We are magnets in an iron globe. We have keys to all doors. We are all inventors, each sailing out on a voyage of discovery, guided each by a private chart, of which there is no duplicate. The world is all gates, all opportunities, strings of tension waiting to be struck¹⁹³

Indeed, a non-religious expression of confidence in the future brief enough to be included on currency could surely be crafted. For example, the currency might be emblazoned with *Confident in Our Future*.

¹⁹¹ *Gaylor*, 74 F.3d at 216 (citing *Lynch*, 465 U.S. at 692–93 (O’Connor, J., concurring)).

¹⁹² *Lynch*, 465 U.S. at 693 (O’Connor, J., concurring) (“Those government acknowledgements of religion serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of . . . expressing confidence in the future . . .”).

¹⁹³ RALPH WALDO EMERSON, LETTERS AND SOCIAL AIMS 137 (1904).

F. Fourth Secular Purpose: Encouraging the Recognition of What Is Worthy

The fourth secular purpose divined by the post-*Lemon* courts was that having *In God we trust* on currency “encourag[es] the recognition of what is worthy of appreciation in society.”¹⁹⁴ This was advanced in *Newdow*.

As to the subjective review, the *Newdow* court did not offer any evidence at all, much less any support from the contemporaneous historical record, that the administrative and legislative actors who put *In God we trust* on our national currency did so to encourage the recognition of what is worthy of appreciation in society.

As to the objective review, the first part asks if the asserted purpose is secular. Here, the asserted purpose of encouraging the recognition of what is worthy of appreciation in society could be secular, unless what is worthy of appreciation in society is religious in nature. Such a focus on religious belief as being what is worthy of appreciation in society might be indicated by a slogan such as *In God we trust*.

The second part of the objective review asks if the asserted secular purpose of the statute is fairly indicated by its language and context. Here, as to whether the asserted secular purpose of encouraging the recognition of what is worthy of appreciation in society is fairly indicated by the language and context of the statute, the *Newdow* court is silent.

The third part of the objective review asks if the connection between the statute and the secular purpose asserted is plausible. Here, the *Newdow* court did not explain how the inclusion of *In God we trust* on currency “encourages the recognition of what is worthy of appreciation in society.” The sole authority cited was Justice O’Connor’s concurrence in *Lynch*,¹⁹⁵ and she provided no support for the assertion.¹⁹⁶

G. Fifth Secular Purpose: Referencing Our Religious Heritage

The fifth secular purpose divined by the post-*Lemon* courts was that having *In God we trust* on currency “symbolizes the historical role of religion in our society,”¹⁹⁷ or serves as a “reference to our religious heritage.”¹⁹⁸ This was advanced in *Gaylor* and *Newdow*.

¹⁹⁴ *Newdow*, 753 F.3d at 108 (quoting *Lynch*, 465 U.S. at 693). The *Newdow* court also asserted that the inscription of *In God we trust* on currency serves “the secular purpose of solemnizing public occasions.” *Id.* at 108 (quoting *Lynch*, 465 U.S. at 693). This ought not be taken as a serious argument.

¹⁹⁵ *Id.* at 108 (quoting *Lynch*, 465 U.S. at 693).

¹⁹⁶ *Lynch*, 465 U.S. at 693.

¹⁹⁷ *Gaylor*, 465 U.S. at 216 (citing *Lynch*, 465 U.S. at 676).

¹⁹⁸ *Newdow*, 753 F.3d at 108 (“[T]he motto, and its inclusion in the design of U.S. currency is a ‘reference to our religious heritage.’” (first quoting *Lynch*, 465 U.S. at 676; and then citing *County of Allegheny v. ACLU*, 492 U.S. 573, 625 (1989) (O’Connor, J., concurring in part and concurring in the judgment))).

As to the subjective review, neither the *Gaylor* court nor the *Newdow* court offered any support at all, much less any evidence from the contemporaneous historical record, that the administrative and legislative actors who put *In God we trust* on our national currency did so as a reference to our religious heritage.

As to the objective review, the first part asks if the asserted purpose is secular. Here, the asserted purpose of recognizing the historical role of religion in our society might be secular. But the historical record surrounding the placement of *In God we trust* on our currency is so completely about recognizing only the role of the Christian religion in our society, and the tone of the history sounds so strongly in terms of advocacy and not historical recognition, that a strong argument could be made that the asserted purpose is religious, not secular.

The second part of the objective review asks if the asserted secular purpose of the statute is fairly indicated by its language and context. Here, as to whether the asserted secular purpose of recognizing the historical role of religion in our society is fairly indicated by the language and context of the statute, the *Gaylor* and *Newdow* courts were silent.

The third part of the objective review asks if the connection between the statute and the secular purpose asserted is plausible. Here, neither the *Gaylor* court nor the *Newdow* court explained how the inclusion of *In God we trust* on currency serves as a “reference to our religious heritage.”

H. Eluding Secular Purpose: De Minimis, Ceremonial Deism, and De Facto Establishment

Some courts and commentators have attempted to elude the result of the secular purpose analysis by suggesting that a range of governmental actions involving religious expression are not worthy of our attention because they are inconsequential, because their religious content is somehow not what it appears, or because they are otherwise somehow rendered constitutional.

Thus one commentator opined that having the motto on currency was “of no practical significance,” and was a “meaningless . . . act of ceremonial obeisance,” perhaps to be taken by some as suggesting it should be constitutionally differentiated from some “[g]overnment expenditures of tax-raised funds for religious institutions” by the magnitude of the expenditures.¹⁹⁹ Another advocated for a *de minimis* analysis, under which “trifling” violations might avoid the heavy hand of the federal courts:

¹⁹⁹ PFEFFER, *supra* note 23, at 169, 238. The author of the cited source believed the motto was unimportant:

Items such as the reference to God on coins . . . are insignificant to the point of being trivial. Government expenditures of tax-raised funds for religious institutions cannot easily be justified on the basis of so meaningless an act of ceremonial obeisance. (It is difficult to understand why true religionists do not resent, rather than approve, this marriage of God and Mammon.)

Id. at 169 (footnote omitted).

[T]o say . . . that there is no place at all for *de minimis* may turn out to be embarrassingly extreme, for the number of small instances of government support, or at least favorable recognition, of religious activity is so great and they are so pervasive that they go unnoticed until attention is drawn to them.

. . . [T]he Supreme Court may yet be glad to have available a doctrine that some matters are really so trifling that they do not set in action the somewhat ponderous machinery of the Federal Government. A few months after the McCollum decision was handed down, a member of the board of education in an upstate New York village had occasion to visit his school. Christmas was coming, and small children has pasted up in their classrooms various pictures—laden camels, and wise men, and a star with spreading rays, and cut-outs of a canonized Lycian bishop of the early Christian church, named Nicholas, white bearded and dressed for sleighing in red garments. As the trustee had learned of the McCollum case he fell to thinking about these clearly sectarian manifestations to which the children of the district, under threat of the truancy laws, were unavoidably subjected. He wondered curiously whether a federal court, if asked, would send a marshal, heavy with the power and majesty of these United States, to scrape the children's pasted pictures from the schoolroom walls.²⁰⁰

The *O'Hair* court quoted Justice Brennan as he sought to avoid the *de minimis* characterization in favor of an argument that frequent repetition somehow purged *In God we trust* of its religious meaning:

It is not that the use of [*In God we trust*] can be dismissed as “de minimis” . . . The truth is that we have simply interwoven the motto so deeply into the fabric of our civil polity that its present use may well not present that type of involvement which the First Amendment prohibits.²⁰¹

It is a curious argument that repetition transforms a religious statement into a secular one.

Related is the “ceremonial deism” argument advanced in both *Gaylor* and *Newdow*. Thus the *Gaylor* court suggested: “The motto’s primary effect is not to advance religion; instead, it is a form of ‘ceremonial deism’ which through historical usage and ubiquity cannot be reasonably understood to convey government approval of religious belief.”²⁰² And the *Newdow* court cited Justice Brennan’s dissent in *Lynch* in which he argued the motto *In God we trust* is “a form [of] ‘ceremonial deism,’ protected from Establishment Clause scrutiny chiefly because [it has] lost through rote repetition any significant religious content.”²⁰³ The argument that repetition eliminates any significant religious content from the thing being repeated is curious. The Catholic Church at

²⁰⁰ PFEFFER, *supra* note 23, at 187–88 (first and third alterations in original) (quoting Arthur E. Sutherland, Jr., *Due Process and Disestablishment*, 62 HARV. L. REV. 1306, 1343–44 (1949)).

²⁰¹ *O'Hair v. Blumenthal*, 462 F. Supp. 19, 20 (W.D. Tex. 1978) (second alteration in original) (citing *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 303 (1963) (Brennan, J., concurring)).

²⁰² *Gaylor*, 74 F.3d at 216 (citing *Allegheny*, 492 U.S. at 625).

²⁰³ *Newdow*, 753 F.3d at 108 (alterations in original) (citing *Lynch*, 465 U.S. at 716 (Brennan, J., dissenting)).

least does not believe that repetition itself diminishes religious effect.²⁰⁴ And generations of school children who recited the Pledge of Allegiance at the start of every school day might also wonder about the value of the exercise if the Pledge lost through rote repetition any significant patriotic content.

In contrast, some writers have acknowledged the clear religious purposes in some of these practices. Dean Jesse Choper wrote:

The placement of “In God We Trust” on coins and currency . . . seems to have no real purpose other than a religious one. Moreover, the proclamations by almost all our Presidents of national days of Thanksgiving to “Almighty God” only seem fairly characterized as having a religious purpose. If one takes seriously the Court’s doctrine that a religious purpose alone produces a violation of the establishment clause, these and many other longstanding practices in our society must be held invalid.²⁰⁵

Professor Mark Tushnet has written that some practices “plainly have religious purposes, and no good is done by pretending, as the Court came close to doing in *Lynch*, that the ordinary understanding of ‘purpose’ somehow allows a holding that these practices do not have religious purposes.”²⁰⁶

Both writers suggested ways to avoid the wholesale invalidity of such practices. Dean Choper noted that “the Supreme Court simply ignores its own articulated test when it wishes to uphold a deeply engrained national practice that clashes with this doctrine,”²⁰⁷ and suggested the adoption of a rule: “Government action should be held to violate the establishment clause if it meets two criteria: first, if its purpose is to aid religion; and second, if it significantly endangers religious liberty in some way by coercing, compromising, or influencing religious beliefs.”²⁰⁸ Presumably, even if a reviewing court acknowledged that the placement of *In God we trust* on currency had a

²⁰⁴ Pope John Paul II, Apostolic Letter *Rosarium Virginis Mariae* [*Rosary of the Virgin Mary*] ¶ 26, October 16, 2002, https://w2.vatican.va/content/john-paul-ii/en/apost_letters/2002/documents/hf_jp-ii_apl_20021016_rosarium-virginis-mariae.html. Pope John Paul II explained:

One thing is clear: although the repeated *Hail Mary* is addressed directly to Mary, it is to Jesus that the act of love is ultimately directed, with her and through her. The repetition is nourished by the desire to be conformed ever more completely to Christ, the true programme of the Christian life. . . . The Rosary helps us to be conformed ever more closely to Christ until we attain true holiness.

Id.

²⁰⁵ Jesse H. Choper, *The Free Exercise Clause: A Structural Overview and an Appraisal of Recent Developments*, 27 WM. & MARY L. REV. 943, 947 (1986).

²⁰⁶ Mark V. Tushnet, *Reflections on the Role of Purpose in the Jurisprudence of the Religion Clauses*, 27 WM. & MARY L. REV. 997, 1004 (1986). Tushnet cited the tension between the *Lynch* majority, which held that display of a crèche in a shopping district had a secular purpose when viewed “in [its] context,” *Lynch*, 465 U.S. at 671, 679 (majority opinion), and Justice Blackmun, who argued that viewing the crèche in this way “relegated [it] to the role of a neutral harbinger of the holiday season, useful for commercial purposes, but devoid of any inherent meaning,” *id.* at 727 (Blackmun, J., dissenting). Tushnet, *supra*, at 1004 n.20.

²⁰⁷ Choper, *supra* note 205, at 947.

²⁰⁸ *Id.* at 948.

religious purpose, it would not find that the practice significantly endangers religious liberty by coercing, compromising, or influencing religious beliefs, and the practice would be upheld.

Professor Tushnet approached the situation differently, using a “de facto establishment” analysis. Suggesting that reviewing courts would approve such practices, he suggested that constitutional doctrine be rewritten to permit the result:

[I]t is unclear why the establishment clause should be interpreted to prohibit these de facto establishments. The Court’s recent behavior confirms that, whatever the doctrinal rubric, such practices are almost certain to be found constitutional anyway. One might as well candidly acknowledge, in our doctrinal structure, that de facto establishments are constitutionally permissible.²⁰⁹

Professor Tushnet acknowledged, but did not resolve, the next question: how to define the contours of the de facto establishment exception. One possibility, toward which he evidenced skepticism, was that “de facto establishments have a long pedigree.”²¹⁰ Another was “that the religious content of de facto establishments, while undeniably present, is relatively slight.”²¹¹

Professor Koppelman has endorsed Tushnet’s de facto establishment proposal:

The . . . answer is to acknowledge the bland “*de facto* establishment of religion” that prevails in the United States. It is true that its religious significance is substantially drained by its antiquity and familiarity, but Professor Mark Tushnet is right that “[t]hese practices plainly have religious purposes, and no good is done by pretending . . . that the ordinary understanding of ‘purpose’ somehow allows a holding that the practices do not have religious purposes.”²¹²

According to Koppelman, this exception should insulate the placement of *In God we trust* on our currency from constitutional review:

The “de facto establishment” should be understood as an exception to the Establishment Clause, confined to public rituals of long standing whose religious content is sufficiently bland. Some aspects of the de facto establishment, such as the names of cities and the placement of “In God We Trust” on the currency, have become drained of religious significance in the minds of many Americans.²¹³

Curiously, for an act drained of religious significance, he also makes reference to Professor Richard Fallon’s suggestion that “the anger and resentment

²⁰⁹ Tushnet, *supra* note 206, at 1004.

²¹⁰ *Id.*

²¹¹ *Id.* at 1005.

²¹² Koppelman, *supra* note 152, at 152–153 (second and third alterations in original) (footnotes omitted) (first quoting MARK DEWOLFE HOWE, *THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY* 11 (1965); and then quoting Tushnet, *supra* note 206, at 1004).

²¹³ *Id.* at 153 (footnote omitted) (citing *Aronow v. United States*, 432 F.2d 242, 243 (9th Cir. 1970)).

that judicial rejection of these practices would arouse” means “that institutional self-interest probably plays a role in insulating these practices from Establishment Clause challenge.”²¹⁴

Professor Koppelman concludes: “Have I just given away the store? I do not think so. The exception is one that in its nature cannot allow the creation of new instances.”²¹⁵ He justifies this exception in two ways. First, quoting *Hall*, he makes the excuse that “ceremonial references to the Deity on coinage and the like”:

may be treated as “grandfathered” exceptions to the general prohibition against officially composed theological statements. Present at the very foundations, few in number, fixed and invariable in form, confined in display and utterance to a limited set of official occasions and objects, they can safely occupy their own small, unexpandable niche in Establishment Clause doctrine. Their singular quality of being rooted in our history and their incapacity to tempt competing or complementary theological formulations by contemporary agencies of government sufficiently cabin them in and distinguish then [sic] from new, open-form theological expressions published under the aegis of the state.²¹⁶

Of course, Professor Koppelman’s justification for the de facto establishment exception does not fit the history of the placement of *In God we trust* on our currency. The practice was not “[p]resent at the very foundations.”²¹⁷ The first placement did not occur until 1864;²¹⁸ the last statutory endorsement of the practice did not occur until 2008.²¹⁹ The practice has not produced violations which are “few in number.”²²⁰ In Fiscal Year 2015 alone, over twenty-three billion circulating notes and coins bore the inscription *In God we trust*.²²¹ The practice has not been “fixed and invariable in form.”²²² Expansions of the practice occurred in 1908,²²³ 1955,²²⁴ and 2008.²²⁵ The practice has not been “confined in display and utterance to a limited set of official occasions

²¹⁴ *Id.* at 153 (citing RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 54–55 (2001)).

²¹⁵ *Id.*

²¹⁶ *Id.* at 153 n.242 (alteration in original) (quoting *Hall v. Bradshaw*, 630 F.2d 1018, 1023 n.2 (4th Cir. 1980)).

²¹⁷ *Id.*

²¹⁸ 1896 REPORT, *supra* note 9.

²¹⁹ Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, § 623(a)(2), 121 Stat. 1844, 2018 (2007) (codified at 31 U.S.C. § 5112(n)(2)(F) (2012)).

²²⁰ Koppelman, *supra* note 152, at 153 n.242 (quoting *Hall*, 630 F.2d at 1023 n.2).

²²¹ In FY 2015, the United States Mint produced 16.2 billion circulating coins. Jeppson, *supra* note 11. In FY 2015, the Bureau of Engraving and Printing produced over seven billion regular notes. U.S. Department of the Treasury, Bureau of Engraving and Printing, *supra* note 11.

²²² Koppelman, *supra* note 152, at 153 n.242 (quoting *Hall*, 630 F.2d at 1023 n.2).

²²³ Act of May 18, 1908, Pub. L. No. 60-120, 35 Stat. 164.

²²⁴ Act of July 11, 1955, Pub. L. No. 84-140, 69 Stat. 290 (codified as amended at 31 U.S.C. § 5114 (2012)) (providing that “all United States currency shall bear the inscription ‘In God We Trust’”).

²²⁵ Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, § 623(a), 121 Stat. 1844, 2018 (2007) (codified at 31 U.S.C. § 5112(n)(2)(F) (2012)).

and objects.”²²⁶ The use of currency bearing *In God we trust* is not limited to official occasions, or “a limited set of . . . objects” unless one considers the set of twenty-three billion circulating notes and coins from Fiscal Year 2015 “limited.” The practice has not occupied an “unexpandable niche in Establishment Clause doctrine.”²²⁷ As noted, the practice was expanded in 1908, 1955, and 2008. The placement of the motto on money has been used as a justification for the governmental placement of the motto in additional ways: on stamps,²²⁸ police cars,²²⁹ and government buildings,²³⁰ for example.

²²⁶ Koppelman, *supra* note 152, at 153 n.242 (quoting *Hall*, 630 F.2d at 1023 n.2).

²²⁷ *Id.* (quoting *Hall*, 630 F.2d at 1023 n.2).

²²⁸ See 101 CONG. REC. 9448 (1955) (statement of Sen. Carlson) (offering a bill to have *In God We Trust* added to newly issued postage stamps).

²²⁹ For example, in 2014 a Missouri sheriff had the slogan “In God We Trust” put on the bumpers of department cars. Steve Pokin, *A Miracle! Both Sides Like ‘In God We Trust’ Story*, SPRINGFIELD NEWS-LEADER (June 2, 2015), <http://www.news-leader.com/story/news/local/ozarks/2015/06/02/miracle-sides-like-god-trust-story/28373773/>. Several citizens complained, including Laura Entwistle, who wrote to the local newspaper: “If taxpayer money was used, is it legal? I’m asking because I am not of a faith that identifies with the name ‘God’ and I don’t think I’m the only one.” Steve Pokin, *Answer Man: Who Decided to Put ‘In God We Trust’ on Cars?*, SPRINGFIELD NEWS-LEADER (May 26, 2015), <http://www.news-leader.com/story/news/local/ozarks/2015/05/26/answer-man-decided-put-god-trust-cars/27985807/>. In an online poll, the local newspaper reported that a majority of the respondents thought the sheriff should not have put the slogan on the cars. *Id.* (reporting 44% for “yes” and 56% for “no” in response to a poll asking whether “Green County Sheriff Arnott should have put ‘In God we trust’ on deputies’ cars”). The sheriff’s response: “I’m guessing she is offended by it. If that’s the case. I’m hoping that she does not use any of our currency either.” *Id.* For additional stories of police officers placing *In God we trust* on their patrol cars, see, for example, Alan Blinder & Richard Pérez-Peña, *Police Agencies Defy Critics and Show ‘In God We Trust,’* N.Y. TIMES (Oct. 3, 2015), <https://www.nytimes.com/2015/10/04/us/police-agencies-defy-critics-and-show-in-god-we-trust.html?mcubz=1&r=0> (“‘If it’s on my money and it’s on the state flag, I can put it on a patrol car,’ said [Polk County, Georgia,] Sheriff [Johnny] Moats . . . ‘I don’t know why an atheist is so upset about us putting up ‘In God We Trust,’” Sheriff Moats said. ‘I’m not saying that they trust God. I’m saying that we, as the guys in this department who put this on our cars, we trust in God. And why is that a bad thing? Even if you don’t believe, you know God’s all about good.’”); Elahe Izadi, *Why Officers Are Putting ‘In God We Trust’ Bumper Stickers on Their Patrol Cars*, WASH. POST (Aug. 5, 2015), <https://www.washingtonpost.com/news/acts-of-faith/wp/2015/08/05/why-officers-are-putting-in-god-we-trust-bumper-stickers-on-their-patrol-cars/> (“‘I’m not hiding from the fact that it’s religious and I’m not trying to make an excuse for the fact that it’s religious,’ [Bay County, Florida, Sheriff Frank McKeithen] said. ‘Morals and ethics—that’s kind of what law enforcement’s supposed to be about’ . . . McKeithen added: ‘You don’t have to be a Christian to trust in God, because you think of all the people in this world that bad things happen to them and at the last moment, they say, “Oh God; please God help me.”’”); Jasmine Spencer, *‘In God We Trust’ Placed on Davidson County Sheriff’s Office Patrol Vehicles*, FOX8 (Feb. 8, 2016), <http://myfox8.com/2016/02/08/in-god-we-trust-on-the-back-of-davidson-county-sheriffs-office-patrol-vehicles/> (“‘It was formed on Judeo-Christian beliefs, on our money and on a lot of places, on the courthouses and so forth,’ [Davidson County, North Carolina, Sheriff David] Grice said. ‘It’s something we believe in.’ . . . ‘I think when you put it on the back on [sic] of that police car it’s reminding people you know that God has been very good to our nation[.]’ [said Pastor Mike McDaniel of Currytown Baptist Church].”).

²³⁰ The Thurston County, Nebraska Board of Supervisors voted 4-2 to display “In God We Trust” in the board room of the county courthouse. Bret Hayworth, *Northeast Nebraska County to Add ‘In God We Trust’ in Courthouse*, SIOUX CITY J. (Aug. 23, 2016), <http://siouxcityjournal.com/lifestyles/faith->

For his second justification for a de facto establishment exception, Professor Koppelman takes comfort in the fact that the Republic has survived:

The other point that can be made on behalf of “grandfathering” is that any deviation from the norm that it tolerates cannot be very dangerous, because the supposed dangers have not yet materialized. The current balance of power between church and state “is not the only acceptable balance that might be struck, but it is acceptable at this stage in history, because the earmark of an inappropriate balance—tyranny by either church or state—is not evident.”²³¹

One can only wonder, if the occurrence of state tyranny is the appropriate test, whether states ought to be able to force school children to recite the Pledge of Allegiance,²³² drivers to display “Live Free or Die” on their license plates,²³³ or applicants to be a notary public to profess a belief in God.²³⁴ After all, such deviations from the constitutional guarantees did not result in a general theocratic tyranny, either.

Whether the argument is that the placement of *In God we trust* on currency is not worth worrying about because it is inconsequential, because its religious content is somehow not what it appears, or because it was otherwise rendered constitutional under a de facto establishment analysis, the appropriate response is essentially the same. It was nicely framed by Leo Pfeffer more than six decades ago, in response to Professor Arthur E. Sutherland, Jr.’s advocacy of a *de minimis* exception. Pfeffer began his rebuttal by helping the reader remember the context in which members of disfavored religious groups view the assertedly *de minimis* practice:

and-values/religion/northeast-nebraska-county-to-add-in-god-we-trust-in/article_07b60296-f4d1-5117-9d58-cbb1d63916a4.html. One supervisor who voted in the minority said displaying the motto is not good public policy, since it violates the separation of church and state. He said religious symbols such as a Christian cross or Jewish Star of David should not be displayed in public buildings. “It is just like having a cross on the wall. That will lead to the interpretation . . . that all our judgments are based on what our religious beliefs are. I don’t have problems with people who have a religious belief. But it doesn’t belong on a county building wall.”

Id. A supervisor who voted in the majority expressed a different view: “It is on our currency . . . I don’t feel there is anything wrong with displaying that. It is not putting any religion down . . . I am not trying to offend anybody.” *Id.* The board acted following remarks by an organizer who “is traveling the state, encouraging county elected officials to add the religious-motivated phrase in public buildings.” *Id.* The president of the Pacific Justice Institute, “a conservative legal defense organization, [which] stands ready to defend any lawsuit that would be filed against the county taking that step,” reported, “We are seeing an explosion of municipalities choosing to do this . . .” *Id.*

²³¹ Koppelman, *supra* note 152, at 153 n.242 (quoting Marci A. Hamilton, *Power, the Establishment Clause, and Vouchers*, 31 CONN. L. REV. 807, 826 (1999)).

²³² *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (holding West Virginia law compelling flag salute and recitation of Pledge of Allegiance unconstitutional).

²³³ *Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (holding New Hampshire statute with such a requirement unconstitutional).

²³⁴ *Torcaso v. Watkins*, 367 U.S. 488, 496 (1961) (declaring Maryland statute with this requirement unconstitutional).

Yet what is “trifling” or *de minimis* to a dominant sect may be of vital importance to a minority sect. To the Christian, Jewish concern over Christological Christmas and Easter observances in the public schools may appear “trifling,” as it does to Professor Sutherland; but . . . to many Jews it is not “trifling.” Protestant judges have decided that the differences between the King James and the Douay versions of the Bible are so small as to be negligible or “trifling”; yet Catholic children have been expelled, flogged, and otherwise persecuted, and indeed lives have been lost, because to Catholics the differences are not *de minimis*. Children of Jehovah’s Witnesses have suffered persecution for refusing to engage in the “trifling” ceremonial act of saluting the American flag; and . . . dissenting Christians were jailed for refusing to contribute “trifling” sums to the established state churches. To an atheist all Christianity—and indeed all religion—would be categorized *de minimis*.²³⁵

Pfeffer concluded his rebuttal of the *de minimis* rule by speaking of the nature of the problem to which the rule would be applied:

The rule of *de minimis* is a rule of convenience. The monetary loss suffered by a taxpayer as the result of a slight waste of public funds may be too insignificant to warrant invoking the judicial process to obtain redress. The expense to government incurred in judicially determining whether a particular government expenditure of a small sum of money is legal, may so far exceed the attacked expenditure that it is more economical to allow the unlawful expenditure to go unchallenged. But different considerations underlie an expenditure attacked under the separation or religious liberty guaranty. The right sought to be vindicated is a religious right, not an economic one, and it is therefore inappropriate to measure it in economic terms. When the Federal or state government makes any appropriation, no matter how slight, for religious purposes, religion has come “within the cognizance of Civil Government.” It is for that reason that Madison warned

That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever.²³⁶

In the next Part, we consider several reform options for our currency. The first eliminates the problem of having a motto that fails the *Lemon* secular purpose test. The second accepts the rationale that the placement of the motto on our currency was a reference to our religious heritage and charts a new direction for our currency that would implement that rationale in a way that is truly respectful of the complete history and diversity of the nation on matters religious.

²³⁵ PFEFFER, *supra* note 23, at 188 (endnotes omitted) (quoting Sutherland, *supra* note 200, at 1344).

²³⁶ *Id.* at 167–68 (endnotes omitted) (quoting JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS ¶ 3 (1785)).

III. “THIS WOULD MAKE A BEAUTIFUL COIN, TO WHICH NO POSSIBLE CITIZEN COULD OBJECT”: HARMONIZING OUR CURRENCY WITH OUR RICH NATIONAL HERITAGE AND CONTEMPORARY DIVERSITY ON MATTERS RELIGIOUS

The administrative and legislative historical record is quite clear that the placement of *In God we trust* on our currency had a religious, not a secular, purpose. The statutes thus fail the first part of the *Lemon* test and are not constitutional.²³⁷ But even if the courts are not convinced to do a more comprehensive and thoughtful analysis and find the placement of the motto on currency to violate the First Amendment, the practice ought to be changed as a prudential matter because the placement is needlessly disrespectful of so many American citizens.

The *Newdow* court found a secular legislative purpose in the dicta of the Supreme Court “that the motto, and its inclusion in the design of U.S. currency is a ‘reference to our religious heritage.’”²³⁸ It seems clear from the administrative and legislative history that the motto *In God we trust* has never been such a secular celebration of our religious heritage.²³⁹ This is in part true because the religious heritage of the nation has always been broader than the favored Christian majority historically associated with the motto. But at the times of the various administrative and legislative enactments we have reviewed it was not seen as a problem because in terms of belief on matters religious America was a very different place than it is today.²⁴⁰

²³⁷ See *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (“First, the statute must have a secular legislative purpose . . .”). We leave for a future discussion whether the placement of *In God we trust* on currency fails the second prong of the *Lemon* test, that “its principal or primary effect must be one that neither advances nor inhibits religion . . .” *Id.* There is an argument that by seeming to some to confirm that this is a “Christian nation,” the placement of the motto on currency has the primary effect of advancing religion. Certainly that was the intention of some of its proponents. See *supra* notes 57–90 and accompanying text.

²³⁸ *Newdow v. Peterson*, 753 F.3d 105, 108 (2d Cir. 2014) (first quoting *Lynch v. Donnelly*, 465 U.S. 668, 676 (1984); and then citing *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 625 (1989)).

²³⁹ See *supra* Part I.

²⁴⁰ To be clear, America was *never* as monolithically Christian as the legislative history of the motto *In God we trust* would indicate. Beyond the range of indigenous Native American religions, other faith traditions were brought to America with early immigrants. African slaves brought with them their religious and faith traditions. Judith Weisenfeld, *Religion in African American History*, OXFORD RES. ENCYCLOPEDIAS: AM. HIST. (Mar. 2015), <http://americanhistory.oxfordre.com/view/10.1093/acrefore/9780199329175.001.0001/acrefore-9780199329175-e-24> (“African traditional religions dominated among those pressed into New World slavery . . .”) The organized Jewish faith in America dates to the middle of the seventeenth century. Congregation Shearith Israel in New York City dates to 1654. 1 JACOB RADER MARCUS, *EARLY AMERICAN JEWRY* 24, 55 (1951). The Muslim presence was documented a few decades later. Peter Manseau, *What Happened to America’s First Muslims?*, HUFFINGTON POST (Mar. 9, 2015), https://www.huffingtonpost.com/petermanseau/what-happened-to-americas-first-muslims_b_6809326.html. Non-believers were present in early America. LEIGH ERIC SCHMIDT, *VILLAGE ATHEISTS: HOW AMERICA’S*

One hundred fifty-six years ago, in 1861, when Reverend Mark Watkinson wrote to suggest the placement of a religious saying on our coins to “relieve us from the ignominy of heathenism,” America was an overwhelmingly Christian nation.²⁴¹ One hundred ten years ago, in 1907, when President Theodore Roosevelt tried without success to remove the motto from our coins, one of his congressional opponents could assert without being ridiculed that “we are one in the recognition of a supreme and all-wise God.”²⁴² Sixty-three years ago, in 1954, when President Dwight Eisenhower celebrated the fact that “[f]rom this day forward, the millions of our school children will daily proclaim in every city and town, every village and rural school house, the dedication of our nation and our people to the Almighty,” America was still religiously uniform enough to mute criticism of the measure.²⁴³

But in the second decade of the twenty-first century the United States has evolved in religious terms from where we were in 1861, 1907, or 1954. We have become a strikingly diverse society on matters of religious belief. Simply put, in our modern society a significant number of American citizens do not trust in the Christian God.

Today, only a minority of adult Americans identify as Protestant Christians.²⁴⁴ Approximately fifty-six million of us are “unaffiliated”:

UNBELIEVERS MADE THEIR WAY IN A GODLY NATION 21 (2016) (“Certainly infidels and free-thinkers constituted a distinct minority in nineteenth-century America, as do avowed atheists and agnostics in the early twenty-first century, but the number of unbelievers was not inconsequential then—just as it is not inconsequential now.”). But, ascertaining the number of atheists is difficult because of the social pressure to appear religious. For example, speaking of “the social impropriety of overt unbelief, Professor Leigh Schmidt cites the Earl of Chesterfield’s counsel in the mid-eighteenth century: “[E]very man is the worse looked upon, and the less trusted, for being thought to have no religion; . . . a wise Atheist (if such a thing there is) would, for his own interest, and character in this world, pretend to some religion.” *Id.* at 4 (quoting 1 EARL OF CHESTERFIELD, LETTERS TO HIS SON ON THE ART OF BECOMING A MAN OF THE WORLD AND A GENTLEMAN 275–76 (Chesterfield Press, 1917)). Many Asian immigrants through the nineteenth century brought non-Christian religious beliefs. Tony Carnes, *Asian American Religions*, OXFORD RES. ENCYCLOPEDIAS: RELIGION (July 2017), <http://religion.oxfordre.com/view/10.1093/acrefore/9780199340378.001.0001/acrefore-9780199340378-e-502> (noting Buddhist, Shinto, Taoist, and Confucian elements within the Asian-American population, in addition to Christian elements). The history of Hindus in America, at least in an organized sense, can be said to date to 1893, when Swami Vivekananda spoke to the World Parliament of Religions in Chicago. Swami Vivekananda, *Addresses at the Parliament of Religions*, RAMAKRISHNA-VIVEKANANDA CTR. OF N.Y. (Sept. 11, 1893), <https://www.ramakrishna.org/chcfull.htm>.

²⁴¹ 1896 REPORT, *supra* note 9.

²⁴² 42 CONG. REC. 3387 (1908) (statement of Rep. Edwards).

²⁴³ President Dwight D. Eisenhower, Statement by the President Upon Signing Bill to Include the Words “Under God” in the Pledge to the Flag (June 14, 1954), in PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES, DWIGHT D. EISENHOWER, 1954, at 563 (1960).

²⁴⁴ PEW RESEARCH CTR., AMERICA’S CHANGING RELIGIOUS LANDSCAPE: CHRISTIANS DECLINE SHARPLY AS SHARE OF POPULATION; UNAFFILIATED AND OTHER FAITHS CONTINUE TO GROW 4 (2015) [hereinafter 2015 PEW RESEARCH SURVEY], <http://assets.pewresearch.org/wp-content/up->

atheists, agnostics, and those who identify as “nothing in particular.”²⁴⁵ The unaffiliated outnumber both Catholics and mainline Protestants.²⁴⁶ Some 14.5 million adult Americans identify with non-Christian faiths: 2.2 million Muslims, 4.7 million Jews, 1.7 million Hindus, and 1.7 million Buddhists.²⁴⁷

The research suggests that our religious diversity is going to increase. Between 2007 and 2014 Protestant Christians lost their majority status.²⁴⁸ During the same period the percentages for Christians overall declined, as did the percentages for Christian subgroups of Protestants, Catholics, evangelicals, mainline Protestants, historically black Christian groups, Orthodox Christians, and Mormons.²⁴⁹ Over the same period, the percentages for Jews, Muslims, Hindus, atheists, agnostics, and those responding “nothing in particular” all increased.²⁵⁰ Looking at age cohorts²⁵¹ and marriage patterns²⁵² suggests our diversity on matters of religion will only increase.

When he suggested the inclusion of a religious motto on our coins, Reverend Watkinson asserted: “This would make a beautiful coin, to which no possible citizen could object.”²⁵³ The nation has changed in ways Reverend Watkinson could not have imagined. People are citizens who he might not have

loads/sites/11/2015/05/RLS-08-26-full-report.pdf (reporting 46.5% of adults identifying as Christian protestants). The study uses nearly 245 million as the number of adult Americans. *Id.* at 7 n.7.

²⁴⁵ *Id.* at 10. The study reports 2014 allocations of 3.1% (atheists), 4.0% (agnostics), and 15.8% (nothing in particular), for an aggregate unaffiliated score of 22.8%. *Id.* at 4. Using the 245 million figure for American adults, these translate into 7.6 million atheists, 9.8 million agnostics, and 38.7 million who identified as “nothing in particular.”

²⁴⁶ *Id.* at 4 (reporting 20.8% of adults identifying as Catholics and 14.7% as mainline Protestants, compared to 3.1% identifying as atheists, 4.0% as agnostics, and 15.8% as “nothing in particular,” for an unaffiliated total of 22.8%).

²⁴⁷ *Id.* The study uses an overall adult population of nearly 245 million, *id.* at 7, with 2014 allocations of 0.9% (Muslim), 0.7% (Buddhist), and 0.7% (Hindu), *id.* at 4. Some 4,655,000 people, 1.9% of the total, are identified as Jewish. *Id.*

²⁴⁸ *Id.* Protestant Christians went from 51.3% in 2007 to 46.5% in 2014, indicating that the Protestant Christian population declined by 4.8%. *Id.*

²⁴⁹ *Id.* Within the Christian grouping, only the Jehovah’s Witness and “other Christian” categories increased; in percentage terms: from 0.7% to 0.8% and 0.3% to 0.4% respectively. *Id.*

²⁵⁰ Within the non-Christian grouping, Jewish respondents increased from 1.7% to 1.9%, Muslims from 0.4% to 0.9%, and Hindus from 0.4% to 0.7%. *Id.* Atheists increased from 1.6% to 3.1%, agnostics from 2.4% to 4%, and “nothing in particular” from 12.1% to 15.8%. *Id.*

²⁵¹ *Id.* at 11 (“One of the most important factors in the declining share of Christians and the growth of the ‘nones’ is generational replacement. As the Millennial generation enters adulthood, its members display much lower levels of religious affiliation, including less connection with Christian churches, than older generations. Fully 36% of young Millennials (those between the ages of 18 and 24) are religiously unaffiliated, as are 34% of older Millennials (ages 25-33). And fewer than six-in-ten Millennials identify with any branch of Christianity, compared with seven-in-ten or more among older generations . . .”).

²⁵² *Id.* at 5 (reporting that 39% of those married since 2010 are in religiously mixed marriages, compared to only 19% in 1960, and that nearly 20% of marriages since 2010 include one religiously unaffiliated partner who married one Christian partner, compared to only 5% in 1960).

²⁵³ 1896 REPORT, *supra* note 9.

thought possible, and the inclusion of *In God we trust* on the nation's currency is fundamentally inconsistent with their beliefs on matters of religion. Of course, there were some citizens at the time of the Rebellion who would have objected to a Christian religious motto, had they been considered worthy to comment. There are many more today.

So where do we go from here? There are several options. The easiest would be to simply remove the motto *In God we trust* from our currency. The problem with this straightforward course of action—ironic given the judicial insistence that having the motto on currency fulfills a secular purpose—is that some Christian groups would oppose the move as a defeat for their religion and a victory for the forces of “infidelity,”²⁵⁴ and as an invitation to divine retribution.²⁵⁵ There is perhaps something to be said for avoiding if possible the apocalyptic conflict described by one proponent at the time of the First Omission: “Let us nail our colors to the masthead and go on to either defeat or victory, with our banners flying and with our trust in the living God emblazoned upon our coinage!”²⁵⁶

But what if the motto on our coins could be reworked to honestly fulfill the *Newdow* court's finding “that the motto, and its inclusion in the design of U.S. currency, is a ‘reference to our religious heritage.’”²⁵⁷ What if we redid our currency to honor the totality of our heritage—and our contemporary diversity—on matters religious? It could be done.

How this might be done is suggested by the 50 State Quarters Program of the United States Mint, which “has been hailed as the most successful coin program in the Nation's history.”²⁵⁸ The program was designed “to promote knowledge of individual states, their history and geography, and the rich diversity of the national heritage among the youth of the United States.”²⁵⁹ Through the program, over the period from 1999 through 2008 the Mint issued fifty commemorative state quarters, each with a unique design. Almost thirty-five billion quarters were produced with the commemorative designs.²⁶⁰

²⁵⁴ See 42 CONG. REC. 3389 (1908) (statement of Rep. Edwards) (“Let us . . . fight infidelity until it is literally stamped out in our country.”).

²⁵⁵ See 153 CONG. REC. 23,970 (2007) (statement of Rep. Burton) (“Once you start turning your back on the good Lord, I think you are going to reap the whirlwind . . .”).

²⁵⁶ Elizabeth A. Reed, Letter to the Editor, *Keep the Banner Flying*, 30 CHRISTIAN HERALD 1125 (1907), as reprinted in 42 CONG. REC. 513 app. A. at 515 (1908).

²⁵⁷ *Newdow v. Peterson*, 753 F.3d 105, 108 (2d Cir. 2014) (first quoting *Lynch v. Donnelly*, 465 U.S. 668, 676 (1984); and then citing *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 625 (1989) (O'Connor, J., concurring in part and concurring in the judgment)).

²⁵⁸ U.S. MINT FIN. DEP'T, 50 STATE QUARTERS REPORT: 10 YEARS OF HONORING OUR NATION'S HISTORY AND HERITAGE 1, 4.

²⁵⁹ *Id.* at 6; see also 50 States Commemorative Coin Program Act, Pub. L. No. 105-124, § 2(1)(B), 111 Stat. 2534, 2534 (1997).

²⁶⁰ U.S. MINT FIN. DEP'T, *supra* note 258, at 4.

The program had substantial public benefits. The Mint estimated that the state commemorative program resulted in a marginal increase in production of 16.3 billion quarters over the ten-year program, and a marginal increase in revenue of \$4.1 billion, which was applied “to help finance the national debt.”²⁶¹ The Mint also reported that the state commemorative program had significant education benefits: “The 50 State Quarters Program’s benefit to the American public extended beyond financial results by increasing knowledge of each state’s history, geography and culture.”²⁶² To help the nation’s teachers fulfill the educational promise of the program, the Mint launched a special initiative:

The United States Mint created the [50 State Quarters Program] Education Initiative to employ the popular 50 State Quarters Program as a medium to teach children about mathematics, geography, social studies and history. . . . As of March 2009, approximately 6.1 million 50 States Quarters Program lesson plans were downloaded from the United States Mint H.I.P. Pocket Change Web site.²⁶³

The Mint concluded that the 50 State Quarters “Program energized the Agency’s efforts to provide financial and educational benefits to the American public through the Nation’s coinage, and opened the door for a new generation of circulating commemorative coin programs.”²⁶⁴

Building on that energy, walking through that open door, could be a new program of the Mint: the “American Coins Celebrating Our Religious Diversity Program” (the “ACCORD Program”). Based on the example of the 50 State Quarters Program, the ACCORD Program would be designed to promote knowledge of individual religions and traditions of opinions and beliefs on matters of religion, their history and geography, and the rich diversity of the national heritage among the youth of the United States.

How would such a program work? Although the 50 State Quarters Program demonstrated the feasibility of a coinage program involving fifty distinct designs, the ACCORD program could be done on a more modest scale. Looking at contemporary survey research reports of our national makeup on matters of religious opinion and belief, a threshold could be set in terms of the number of individuals self-identifying with a given survey

²⁶¹ *Id.* at 1 (“The United States Mint estimated it shipped 16.3 billion more coins to the [Federal Reserve Bank] than it would have in the absence of the Program. Consequently, the Agency attributes \$4.1 billion in revenue and \$3.0 billion in seigniorage [revenue net production and distribution costs] solely to the 50 State Quarters Program.”); *id.* at 2 (“The 50 State Quarters Program met the financial expectations of the authorizing legislation, generating \$8.6 billion in revenue and \$6.3 billion in seigniorage to help finance the national debt.”); *id.* at 4 (“Higher revenue and seigniorage allow the United States Mint to transfer larger sums to the Treasury General Fund, which helps finance the national debt.”).

²⁶² *Id.* at 2.

²⁶³ *Id.*

²⁶⁴ *Id.*

response. Any response having numbers at or above the threshold would be qualified to participate in the ACCORD program. For example, using recent findings of the Pew Research Center,²⁶⁵ if one set the percentage qualification threshold at 0.5%, a grouping would have to have almost one and a quarter million adherents to qualify.²⁶⁶ Assume the issuance of thirty-five billion quarters, the same number as in the 50 State Quarters Program, and a per capita allocation.²⁶⁷ Using that threshold, a rich diversity of opinions and thoughts on matters of religion would be represented:

| Grouping | Percentage | Number | Quarters |
|-----------------------|------------|-------------|----------------|
| Protestant | 46.5 | 113,925,000 | 16,726,618,705 |
| Catholic | 20.8 | 50,960,000 | 7,482,014,388 |
| Nothing in Particular | 15.8 | 38,710,000 | 5,683,453,237 |
| Agnostic | 4.0 | 9,800,000 | 1,438,848,921 |
| Atheist | 3.1 | 7,595,000 | 1,115,107,914 |
| Jewish | 1.9 | 4,655,000 | 683,453,237 |
| Mormon | 1.6 | 3,920,000 | 575,539,568 |
| Muslim | 0.9 | 2,205,000 | 323,741,007 |
| Jehovah's Witness | 0.8 | 1,960,000 | 287,769,784 |
| Buddhist | 0.7 | 1,715,000 | 251,798,561 |
| Hindu | 0.7 | 1,715,000 | 251,798,561 |
| Orthodox Christian | 0.5 | 1,225,000 | 179,856,115 |
| Total | 97.3 | 238,385,000 | 34,999,999,998 |

A 0.5% threshold would include 97.3% of adult Americans in the program, some 238,385,000 of the estimated 245,000,000, and would not exclude any individually identified grouping in the Pew Research study.²⁶⁸

²⁶⁵ See generally 2015 PEW RESEARCH SURVEY, *supra* note 244.

²⁶⁶ This calculation is based on the Pew Research Center's estimate that in 2014 the U.S. adult population was about 245 million. *Id.* at 7 (estimating that the U.S. adult population grew from 227 million in 2007 to 245 million in 2014).

²⁶⁷ U.S. MINT FIN. DEP'T, *supra* note 258, at 1. If the coins were allocated equally among the listed groupings, each would be allocated slightly more than 2.9 billion coins.

²⁶⁸ 2015 PEW RESEARCH SURVEY, *supra* note 244, at 4. The category "Other Christian" within the classification "Christian" accounts for 0.4% and is undefined. The category "Other world religions" within the classification "Non-Christian faiths" accounts for 0.3% and includes "Sikhs, Baha'is, Taoists, Jains and a variety of other world religions." The "Other faiths" within the classification "Non-Christian faiths" accounts for 1.5% and includes "Unitarians, New Age religions, Native American religions and a number of other non-Christian faiths." *Id.*

Following the protocols of the 50 State Quarters Program, each qualified ACCORD Program participant would be able—through selection processes like those employed by the individual states—to adopt a design which would then be produced by the Mint. One can only begin to imagine the interesting diversity that the designs might reflect. For example, the 1.7 million Hindu Americans might choose a design for their 251,798,561 quarters with Ganesh, the God of wisdom, or Lakshmi, the Goddess of wealth and prosperity. The Church of Jesus Christ of Latter-Day Saints, representing almost four million Americans, might choose a design for their 575,539,568 quarters with the Angel Moroni and a quotation from The Doctrine and Covenants: “[S]tand ye in holy places, and be not moved”²⁶⁹

The largest single group in the Pew study are the almost 114 million Protestant Christians.²⁷⁰ One can imagine a consensus emerging that they be represented on their 16,726,618,705 quarters by some image of the cross, perhaps with the Protestant version of the Ten Commandments. The fifty-one million Catholics could select a drawing of the Madonna and child for their 7,482,014,388 quarters. Given their teachings on idolatry, the almost two million Jehovah’s Witnesses might choose a design with simply a Biblical quotation for their 287,769,784 quarters, such as 1 Timothy 2:5: “For there is one God, and one mediator between God and men, a man, Christ Jesus.”²⁷¹

The 1.7 million Buddhists might desire a coin with an image of Buddha and a reference to the Five Precepts for their 251,798,561 quarters. The 4.6 million adult Americans who are Jewish might choose to be represented by the image of a menorah and an appropriate Tanakh passage for their 683,453,237 quarters. One might hope that agnostics, accounting for almost ten million adult Americans, would be represented on their 1,438,848,921 quarters by the image of American agnostic Robert Ingersoll and the quotation: “I do not deny. I do not know—but I do not believe.”²⁷² The 2.2 million Muslims might be represented on their 323,741,007 quarters by a coin reproducing the *shahada*: “[T]here is no god but God. Muhammad is the messenger of God.”²⁷³

Some groupings are more difficult. How, for example might the almost thirty-nine million adult Americans in the “nothing in particular” category choose to be represented on their 5,683,453,237 quarters? With the inscription, “Whatever”? At almost 16% of the overall adult population, they surely could not in fairness be excluded. God alone knows how the 7.6 million atheists would choose to be represented on their 1,115,107,914 quarters.

²⁶⁹ CHURCH OF JESUS CHRIST OF LATTER DAY SAINTS, THE DOCTRINE AND COVENANTS § 87:8.

²⁷⁰ 2015 PEW RESEARCH SURVEY, *supra* note 244, at 4.

²⁷¹ 1 *Timothy* 2:5 (New World Translation of the Holy Scriptures (2013 Revision)).

²⁷² Ingersoll, *supra* note 146.

²⁷³ Lloyd Ridgeon, *Islam, in* MAJOR WORLD RELIGIONS: FROM THEIR ORIGINS TO THE PRESENT 230, 232 (Lloyd Ridgeon ed., 2003).

Of course some groups might wish to aggregate or disaggregate. One can imagine the agnostics, atheists, and “nothing in particular” groups trying to negotiate an aggregation of their 56.1 million adults, 22.9 percent of the total, for 8,237,410,072 coins. The outcome would be interesting.

More likely might be disaggregations, as components of the Protestant Christian grouping elected to go their own way. With some thirty-six million mainline Protestants one can imagine a disaggregation along denominational lines; the same for the sixty-two million evangelical Protestants.

However the groupings realigned, the results would be fascinating. Certainly one would expect significant collateral benefits to accrue from a coinage program celebrating the nation’s diversity of opinions and beliefs on matters of religion. Like the 50 State Quarters Program, the ACCORD Program would prove to be financially beneficial and educationally interesting.

The 50 State Quarters Program saw American school children searching for rare state quarters to complete fifty-state collections. Presumably the ACCORD Program would see the next generation of school children searching as assiduously for that elusive Orthodox Christian or Hindu quarter, that rare Mormon or Muslim coin.

Surely the ACCORD Program would benefit the American public by increasing knowledge of our history and culture. One would assume that to help the nation’s teachers fulfill the educational promise of the Program, the Mint would launch a special initiative to employ the Program as a medium to teach children about mathematics, religious studies, social studies, and history.

Some citizens might be initially uncomfortable with coins that contain religious imagery and messaging from a faith tradition other than their own. But they would surely come to understand that the drawing of Ganesh, the Hindu God of wisdom, on the quarter in their pocket is a patriotic and ceremonial reference with no theological impact; that the Madonna and child on the coin they use at the car wash has no theological meaning. They would come to see that the image of Buddha and the reference to the Five Precepts serve only the secular ceremonial function of formalizing the quarter they got as change at the QuickTrip. They would see the image of the Angel Moroni on the quarter they handed to their child as a means of fostering patriotism, the quotation from American agnostic Robert Ingersoll as a way to express confidence in the future. Glancing at the quarter with a quotation from the Shahada—*There is no god but God. Muhammad is the messenger of God.*—would assuredly encourage in them the recognition of what is worthy of appreciation in society. They would see these coins as merely symbolic of the historical role of religion in our society. They would see that the religious messaging and imagery has a secular, not a religious, purpose.

Sure they would.

CONCLUSION

It is the choicest compliment that has ever been paid us, and the most gratifying to our feelings. It is simple, direct, gracefully phrased; it always sounds well—In God We Trust. I don't believe it would sound any better if it were true. And in a measure it is true—half the nation trusts in Him. That half has decided it.

—Mark Twain²⁷⁴

Our history with respect to constitutional challenges to having *In God we trust* on our currency nicely illustrates Freud's observation that "Where the questions of religion are concerned people are guilty of every possible kind of insincerity and intellectual misdemeanor."²⁷⁵ How other than as an insincerity could one characterize the assertion that the motto "has no theological or ritualistic impact"?²⁷⁶ Given the history of administrative and legislative actions concerning the placement of the motto on our currency, how could the conclusion that they had a secular legislative purpose be other than an intellectual misdemeanor?

The problem is the lingering sense that our history on this issue, and on a range of related issues involving the religious liberty interests of disfavored citizens, evidences more than Freud's insincerity and intellectual misdemeanors. The history points to a larger problem, a fundamental lack of respect for some Americans based on their beliefs on matters of religion.

In one sense, Twain's observation is correct. The issue of whether it is appropriate to have *In God we trust* on our currency has been decided by the dominant part of the population. After all, in 1864, 1908, 1955, and 2007, statutes were enacted approving or expanding the placement, and on five occasions courts have upheld the constitutionality of the practice.²⁷⁷ But in another sense, Twain's observation is perhaps premature. For some of us, the issue of whether it is appropriate to have *In God we trust* on our currency still waits for a serious, careful, and deliberate judicial analysis under the Establishment Clause. The issue may not have been decided just yet.

How such an analysis might proceed is suggested by an older case

²⁷⁴ Mark Twain, Personal Notes of Mark Twain, in ALBERT BIGELOW PAINE, MARK TWAIN'S NOTEBOOK 394 (1935). In 2016, the United States Mint issued two coins honoring Mark Twain. *Mark Twain Commemorative \$1 Silver Coin*, U.S. MINT, <https://www.usmint.gov/coins/coin-medal-programs/commemorative-coins/mark-twain-silver> (last updated June 1, 2016); *Mark Twain Commemorative \$5 Gold Coin*, U.S. MINT, <https://www.usmint.gov/coins/coin-medal-programs/commemorative-coins/mark-twain-gold> (last updated June 1, 2016); see also *Mark Twain Commemorative Coins*, U.S. MINT, <https://www.usmint.gov/learn/coin-and-medal-programs/commemorative-coins/mark-twain> (last updated Nov. 3, 2016). One can but wonder what Twain's reaction would have been to the *In God we trust* inscriptions on the coins.

²⁷⁵ FREUD, *supra* note 126.

²⁷⁶ Aronow v. United States, 432 F.2d 242, 243 (9th Cir. 1970) (citing PFEFFER, *supra* note 23, at 238).

²⁷⁷ See *supra* Parts I and II, and notes 127–132 and accompanying text.

presenting a related question. In 1980, the Fourth Circuit heard *Hall*, the challenge to North Carolina's "Motorist's Prayer."²⁷⁸ The court found the writing to be religious, and while it accepted that the asserted purpose of promoting vehicular safety was secular, it observed that "the state cannot escape the proscriptions of the Establishment Clause merely by identifying a beneficial secular purpose."²⁷⁹ Rejecting a *de minimis* exception as to "relatively minor encroachments," the *Hall* court quoted the Supreme Court for the proposition that "[t]he breach of neutrality that is today a trickling stream may all too soon become a raging torrent."²⁸⁰ The court concluded:

By placing its imprimatur on the particular kind of belief embodied in any prayer, the state necessarily offends the sensibilities not only of nonbelievers but of devout believers among the citizenry who regard prayer "as a necessarily private experience." The Establishment Clause is intended to protect our society from the threat of political division along religious lines.

As a moment's reflection reveals, only a ruthless, absolutist application of the principle as it relates to officially composed prayers can insure the intended protection. No *de minimis* exception is tolerable.²⁸¹

The *Hall* court recognized the impossibility of carving out a *de minimis* exception: "Indeed it could be suggested with considerable support from history that there is literally no such thing as an innocuous theological statement, if by that is meant one incapable of exciting any significant religious divisions within the populace."²⁸² The *Hall* court held the North Carolina Motorist's Prayer unconstitutional.²⁸³

How might an analysis along the lines of that in *Hall* be applied to the placement of *In God we trust* on currency? The reviewing court could start by agreeing with Dean Choper and Professor Tushnet that having the motto on currency clearly has a religious, not a secular purpose. It could reject a *de minimis* exception,²⁸⁴ quoting *Hall* for the proposition that "[t]he breach of neutrality that is today a trickling stream may all too soon become a raging

²⁷⁸ *Hall v. Bradshaw*, 630 F.2d 1018 (4th Cir. 1980).

²⁷⁹ *Id.* at 1020.

²⁸⁰ *Id.* at 1021 (alteration in original) (quoting *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 225 (1963)).

²⁸¹ *Id.* (first quoting *Schempp*, 374 U.S. at 283–85; then citing *Lemon v. Kurtzman*, 403 U.S. 602, 622 (1971); and then citing *Comm. of Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 794–98 (1972)).

²⁸² *Id.* at 1022. The court also observed that
[w]hile the prayer at issue might at first blush seem utterly innocuous, there are doubtless many even within the main theological stream of the dominant religious culture of the affected populace who are at least made uncomfortable, and perhaps are positively offended, by the sort of narrowly confined intercessory supplication for deity's private attention that it represents.

Id. at 1022 n.1.

²⁸³ *Id.* at 1023.

²⁸⁴ *Id.* at 1021 ("No *de minimis* exception is tolerable.").

torrent,”²⁸⁵ and the conclusion that “there is literally no such thing as an innocuous theological statement, if by that is meant one incapable of exciting any significant religious divisions within the populace.”²⁸⁶ The reviewing court could affirm the *Hall* declaration that “[t]he Establishment Clause is intended to protect our society from the threat of political division along religious lines,” adopt its conclusion that “only a ruthless, absolutist application of the principle . . . can insure the intended protection,”²⁸⁷ and declare the practice of having *In God we trust* on currency unconstitutional.

But we need not speculate how the *Hall* court would have analysed having *In God we trust* on our currency. In dicta, it told us, and the statement was a complete deviation from its Motorist’s Prayer analysis:

References to the Deity in our ceremonies and on our coinage and seals do not violate the Establishment Clause because they merely reflect this fact of our history [that “[w]e are a religious people whose institutions presuppose a Supreme Being”] and no longer have any potentially entangling theological significance.²⁸⁸

What happened to the court that described *de minimis* exceptions as intolerable, that advocated a ruthless, absolutist application of the Establishment Clause to protect society from the threat of political division along religious lines? What became of the judges who thought there is no such thing as an innocuous theological statement? At what point did that court become comfortable with grandfathering violations of the Establishment Clause?

Using Pfeffer’s insight into how disfavored religious groups may see practices the favored religious groups see as “trifling,” consider how the dismissive statement about *In God we trust* from *Hall* might appear to an agnostic or atheist, a Hindu or Wiccan.²⁸⁹ In its analysis of the Motorist’s Prayer, the *Hall* court demonstrated a concern over variations of belief *within*

²⁸⁵ *Id.* at 1021 (alteration in original) (quoting *Schempp*, 374 U.S. at 225).

²⁸⁶ *Id.* at 1022.

²⁸⁷ *Id.* at 1021.

²⁸⁸ *Id.* at 1022–23 (inner alteration in original) (quoting *Zorach v. Clauson*, 343 U.S. 306, 313 (1952)).

In a footnote, the court asserted:

In a very real sense they may be treated as “grandfathered” exceptions to the general prohibition against officially composed theological statements. Present at the very foundations, few in number, fixed and invariable in form, confined in display and utterance to a limited set of official occasions and objects, they can safely occupy their own small, unexpandable niche in Establishment Clause doctrine. Their singular quality of being rooted in our history and their incapacity to tempt competing or complementary theological formulations by contemporary agencies of government sufficiently cabin them in and distinguish them from new, open-form theological expressions published under the aegis of the state.

Id. at 1023 n.2.

²⁸⁹ PFEFFER, *supra* note 23, at 188 (“[W]hat is ‘trifling’ or *de minimis* to a dominant sect may be of vital importance to a minority sect.”).

the “dominant religious culture.”²⁹⁰ But in its dicta about the motto, the *Hall* court evidenced no concern over variations of religious belief *between* citizens disfavored and favored on religious grounds. By quoting a saccharine and ahistorical “fact of our history”—“that ‘[w]e are a religious people whose institutions presuppose a Supreme Being’”—the *Hall* court ignored the Establishment Clause and demeaned those disfavored on the basis of their religious beliefs.²⁹¹ And when it declared that statements such as *In God we trust* “no longer have any potentially entangling theological significance,” it apparently presumed to instruct the disfavored among us on what they could think theologically significant.²⁹² The *Hall* court dicta would have denied those outside the favored religious culture the same status and respect it accorded those within it.

The same dismissive and disrespectful treatment is found in the *de minimis*, ceremonial deism, and de facto establishment analyses. The notion that a *de minimis* exception is justified because the number of instances of favorable governmental recognition of religion “is so great and they are so pervasive that they go unnoticed until attention is drawn to them” is clearly drawn from the perspective of those with favored religious beliefs.²⁹³ It seems reasonable to imagine that violations of the Establishment Clause that are so common as to be invisible to the favored may be especially apparent and hurtful to the disfavored. Similarly, a disfavored citizen might be expected to view differently than a favored citizen whether it is reasonable to view as conveying governmental approval of religious belief an Establishment Clause violation that is broadly committed and has a long history, the kind that some analysts would excuse as ceremonial deism.²⁹⁴ A disfavored citizen might also be expected to view differently practices that would otherwise violate the Establishment Clause but which the de facto establishment analysis assures us are “relatively slight,”²⁹⁵ or “bland.”²⁹⁶ The observation that “[s]ome aspects of the de facto establishment, such as the . . . placement of ‘In God We Trust’ on the currency, have become drained of religious significance in the minds of many Americans”²⁹⁷ simply suggests that for *other* Americans—those disfavored

²⁹⁰ *Hall*, 630 F.2d at 1022 n.1 (“While the prayer at issue might at first blush seem utterly innocuous, there are doubtless many even within the main theological stream of the dominant religious culture of the affected populace who are at least made uncomfortable, and perhaps are positively offended, by the sort of narrowly confined intercessory supplication for deity’s private attention that it represents.”).

²⁹¹ *Id.* at 1022–23 (alteration in original) (quoting *Zorach*, 343 U.S. at 313).

²⁹² *Id.* at 1023.

²⁹³ PFEFFER, *supra* note 23, at 187 (quoting Sutherland, *supra* note 200, at 1343).

²⁹⁴ *Gaylor v. United States*, 74 F.3d 214, 216 (10th Cir. 1996) (citing *City of Allegheny v. ACLU*, 492 U.S. 573, 625 (1989) (O’Connor, J., concurring in part and concurring in the judgment)) (noting “historical usage and ubiquity”).

²⁹⁵ Tushnet, *supra* note 206, at 1005.

²⁹⁶ Koppelman, *supra* note 152, at 152.

²⁹⁷ *Id.* at 153 (emphasis added).

on the basis of religious belief—the challenged practices have not become drained of religious significance.

Beyond Freud’s insincerities and intellectual misdemeanors, the serious problem with having *In God we trust* on our currency, and the unserious, careless, and cursory judicial analysis it has been given, is the disrespect it evidences toward the sincerely held beliefs on matters of religion of some of our fellow citizens, and thus by extension disrespect toward the citizens themselves.

Of course, the placement of *In God we trust* on our currency is just one example of a larger pattern of statutes, rules, and governmental actions that evidence disrespect towards citizens with disfavored religious beliefs. A few examples help to remind us that these are not only theoretical problems.

“In the winter of 2014, Rawda Musaitef was involved in a custody dispute with her former husband . . . in a Philadelphia family court.”²⁹⁸ When called to testify, Rawda, a Muslim, requested to be sworn using a Quran instead of a Bible. Her request was refused²⁹⁹ because the Pennsylvania statute provides that: “Every witness, before giving any testimony shall take an oath in the usual or common form, by laying the hand upon an open copy of the Holy Bible”³⁰⁰

In the fall of 2009, Cecil Bothwell, an atheist, was running to be a member of the Asheville city council.³⁰¹ His candidacy was challenged by H.K. Edger-ton, citing a provision of the North Carolina constitution which bars from office “any person who shall deny the being of Almighty God.”³⁰² Bothwell

²⁹⁸ Allan W. Vestal, *Fixing Witness Oaths: Shall We Retire the Rewarder of Truth and Avenger of Falsehood?*, 27 U. FLA. J.L. & PUB. POL’Y 443, 453 (2016).

²⁹⁹ *Id.* at 456.

³⁰⁰ *Id.* at 454 (quoting 42 PA. CONS. STAT. § 5901(a) (1978)). Pennsylvania does allow an alternative method to take a religious oath: “or by lifting up the right hand and pronouncing or assenting to the following words: ‘I, A. B., do swear by Almighty God, the searcher of all hearts, that I will _____, and that as I shall answer to God at the last great day.’” *Id.* (quoting 42 PA. CONS. STAT. § 5901(a)). Presumably Rawda Musaitef had the same objections to a religious oath swearing to the Christian God. Pennsylvania also provides for a non-religious affirmation, *id.* (citing 42 PA. CONS. STAT. § 5901(b)), which was available to Rawda Musaitef but which evidently she deemed an inadequate substitute for a religious oath administered using the Quran, the book of her faith tradition.

³⁰¹ Allan W. Vestal, *The Lingering Bigotry of State Constitution Religious Tests*, 15 U. MD. L.J. RACE, RELIG., GENDER & CLASS 55, 58–59 (2015) [hereinafter Vestal, *Lingering Bigotry*]; see also David Zucchini, *Councilman Under Fire for Atheism*, L.A. TIMES (Dec. 20, 2009), <http://articles.latimes.com/2009/dec/20/nation/la-na-hometown-asheville20-2009dec20> (reporting others describing Bothwell as an “atheist,” a “post-theist,” “Satan’s helper,” and a “radical extremist”).

³⁰² Vestal, *Lingering Bigotry*, *supra* note 301, at 58 (quoting N.C. CONST. art. VI, § 8). Today, eight states—Arkansas, Maryland, Mississippi, North Carolina, Pennsylvania, South Carolina, Tennessee, and Texas—have religious tests for public office; provisions which are, of course, unconstitutional. *Id.* at 62.

refused to drop out of the race. He won his election and sits on the Asheville city council today.³⁰³

In the summer of 2014, an unidentified Air Force Technical Sergeant wanted to reenlist.³⁰⁴ A non-believer, he struck the words “so help me God” from the official reenlistment form. The Air Force refused to let him reenlist without assenting to the religious oath.³⁰⁵ The Technical Sergeant challenged the Air Force’s position, and amid public controversy, the government backed down.³⁰⁶

In the winter of 2006, the first Muslim elected to Congress, Keith Ellison of Minnesota’s Fifth Congressional District, was the focus of controversy when he announced that he would take the symbolic oath of office using a Quran rather than a Bible.³⁰⁷ One prominent political commentator said that the new Representative should be required to take the oath on the Bible because to allow him to be sworn on the Quran would do “more damage to the unity of America and to the value system that has formed this country than the terrorists of 9-11.”³⁰⁸ Congressman Ellison elected to do the ceremony holding a Quran that had been owned by Thomas Jefferson “because it showed that a visionary like Jefferson believed that wisdom could be gleaned from many sources.”³⁰⁹

Viewed in one way, these cases are not as extreme as they might be. Rawda Musaitef was not being told she could not testify, or even that she had

³⁰³ *Meet City Council*, CITY OF ASHEVILLE, http://www.ashevillenc.gov/council/meet_city_council.htm (last visited Nov. 13, 2017). Recently, however, Bothwell narrowly lost in the primary, finishing in seventh where a sixth-place finish was required to advance to the general election. Matt Bush, *Asheville Primary Results—Bothwell Ousted, Other Incumbents Advance*, BLUE RIDGE PUB. RADIO (Oct. 10, 2017), <http://bpr.org/post/asheville-primary-results-bothwell-ousted-other-incumbents-advance>.

³⁰⁴ Vestal, *Lingering Bigotry*, supra note 301, at 95–96.

³⁰⁵ *Id.* at 96 (“The airman was told his only options were to sign the religious oath section of the contract without adjustment and recite an oath concluding with ‘so help me God,’ or leave the Air Force” (alteration in original) (quoting Stephen Losey, *Group: Airman Denied Reenlistment for Refusing to Say ‘So Help Me God,’* AIR FORCE TIMES (Sept. 4, 2014, 6:00 AM), <https://www.airforcetimes.com/news/pentagon-congress/2014/09/04/group-airman-denied-reenlistment-for-refusing-to-say-so-help-me-god/>)).

³⁰⁶ *Id.* at 96–97. The Air Force rule was clearly unconstitutional, given the Article VI § 3 provision that “no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.”

³⁰⁷ Allan W. Vestal, *Regarding Oaths of Office*, 37 PACE L. REV. 292, 292 (2016).

³⁰⁸ *Id.* at 293 (quoting Dennis Prager, *America, Not Keith Ellison, Decides What Book a Congressman Takes His Oath on*, TOWNHALL (Nov. 28, 2006, 12:01 AM), <https://townhall.com/columnists/dennis-prager/2006/11/28/america,-not-keith-ellison,-decides-what-book-a-congressman-takes-his-oath-on-n792991>).

³⁰⁹ *Id.* (quoting Frederic J. Frommer, *Ellison Uses Thomas Jefferson’s Quran*, WASH. POST (Jan. 5, 2007, 7:32 AM)).

to swear a Christian oath in order to testify.³¹⁰ She could have testified using a non-religious affirmation. But to use a religious oath, she would have had to use a Christian oath. Cecil Bothwell was not being told he could not live in Asheville, merely that to serve as an elected official of his hometown he had to be a Christian. The unidentified Technical Sergeant was not being told he could not serve in the Air Force, only that to do so he had to swear an oath contrary to his religious beliefs. Congressman Ellison was not being told he could not serve in Congress, merely that to do so he ought to swear his oath of office on the Bible, a religious text outside his faith tradition.

In each case, the member of the disfavored religious group was being tolerated but not respected. And toleration is the wrong concept when all are equally free. Baptist abolitionist and religious liberty advocate John Leland framed the argument in 1790: “[T]he very idea of toleration is despicable; it supposes that some have a pre-eminence above the rest, to grant indulgence; whereas, all should be equally free, Jews, Turks, Pagans and Christians.”³¹¹ Toleration is the wrong concept when dealing with citizens who are free to profess as they wish on matters of religious belief; as Andrew Dunlap argued in 1834 when defending Abner Kneeland: “This is the boasted land of toleration. No, gentlemen, that is not the proper word, for who shall presume to tolerate another, when the latter has an undeniable right to enjoy and maintain his own opinions?”³¹²

At a time when our nation is tense with the cross-cutting cleavages of modernity, when America is evolving toward a strikingly diverse future on matters of religion, we would be well to remember that fidelity to the constitutional guarantee of religious liberty requires more than toleration—it requires genuine respect for fellow citizens whose religious beliefs differ from our own. If we are to be a nation that is enhanced, and not fractured, by our religious diversity, then we must truly respect one another on matters of religion. It will not be enough that the government stops disfavoring some citizens on the basis of their religious beliefs—each of us must be respectful in our own hearts—but that the government do so is a necessary predicate.

³¹⁰ Although there was a time when she could have been excluded from testifying because of her religious beliefs. Vestal, *Lingering Bigotry*, *supra* note 301, at 71. Remarkably, even today, two states—Arkansas and Maryland—have religious tests for testimonial competency; provisions which are, of course, unconstitutional. *Id.* at 71 & app. C.

³¹¹ DICKSON D. BRUCE, JR., *EARNESTLY CONTENDING: RELIGIOUS FREEDOM AND PLURALISM IN ANTEBELLUM AMERICA* 124 (2013) (alteration in original) (quoting John Leland, *The Excess of Civil Power Exploded*, in *THE WRITINGS OF THE LATE ELDER JOHN LELAND, INCLUDING SOME EVENTS IN HIS LIFE* 117, 118 (L. F. Greene ed., Arno Press, Inc., rept. ed. 1969)) (1845)

³¹² ANDREW DUNLAP, *A SPEECH DELIVERED BEFORE THE MUNICIPAL COURT OF THE CITY OF BOSTON IN DEFENSE OF ABNER KNEELAND ON AN INDICTMENT FOR BLASPHEMY* 17 (1834).

When Reverend Watkinson wrote Treasury Secretary Chase during the Rebellion to propose adding “the recognition of the Almighty God in some form on our coins,” he made a specific proposal for how the coins should be altered:

What I propose is that instead of the goddess of liberty we shall have next inside the 13 stars a ring inscribed with the words “perpetual union;” within the ring the all-seeing eye, crowned with a halo; beneath this eye the American flag, bearing in its fields stars equal to the number of the States united; in the folds of the bars the words “God, liberty, law.”³¹³

It is ironic that Reverend Watkinson wanted to banish the Goddess of Liberty to make room for recognition of the Christian God. Surely the time has come to remove the motto and recognize on our currency that the religious liberty interests of all our citizens have a claim prior to that of any religion.

³¹³ 1896 REPORT, *supra* note 9, at 260.

APPENDIX A.
NOVEMBER 13, 1861 LETTER FROM REVEREND MARK R. WATKINSON
TO TREASURY SECRETARY SALMON P. CHASE.³¹⁴

RIDLEYVILLE, PA., *November 13, 1861.*

DEAR SIR: You are about to submit your annual report to the Congress respecting the affairs of the national finances.

One fact touching our currency has hitherto been seriously overlooked. I mean the recognition of the Almighty God in some form on our coins.

You are probably a Christian. What if our Republic were now shattered beyond reconstruction? Would not the antiquaries of succeeding centuries rightly reason from our past that we were a heathen nation? What I propose is that instead of the goddess of liberty we shall have next inside the 13 stars a ring inscribed with the words "perpetual union;" within the ring the all-seeing eye, crowned with a halo; beneath this eye the American flag, bearing in its field stars equal to the number of the States united; in the folds of the bars the words "God, liberty, law."

This would make a beautiful coin, to which no possible citizen could object. This would relieve us from the ignominy of heathenism. This would place us openly under the Divine protection we have personally claimed. From my heart I have felt our national shame in disowning God as not the least of our present national disasters.

To you first I address a subject that must be agitated.

M.R. WATKINSON,
Minister of the Gospel.

Hon. S. P. Chase,
Secretary of the Treasury

³¹⁴ U.S. DEP'T OF THE TREASURY, ANNUAL REPORT OF THE SECRETARY OF THE TREASURY ON THE STATE OF THE FINANCES FOR THE YEAR 1896, H.R. DOC. NO. 54-8, at 260 (1897); *History of "In God We Trust,"* U.S. DEP'T OF THE TREASURY, <http://www.treasury.gov/about/education/pages/in-god-we-trust.aspx>.

APPENDIX B.

NOVEMBER 20, 1861 LETTER FROM TREASURY SECRETARY SALMON P.
CHASE TO JAMES POLLOCK, DIRECTOR OF THE MINT.³¹⁵

TREASURY DEPARTMENT, *November 20, 1861.*

DEAR SIR: No nation can be strong except in the strength of God, or safe except in His defense. The trust of our people in God should be declared on our national coins.

You will cause a device to be prepared without unnecessary delay with a motto expressing in the fewest and tersest words possible this national recognition.

Yours, truly,

S. P. CHASE.

James Pollock, Esq.,
Director of the Mint, Philadelphia, Pa.

³¹⁵ U.S. DEP'T OF THE TREASURY, ANNUAL REPORT OF THE SECRETARY OF THE TREASURY ON THE STATE OF THE FINANCES FOR THE YEAR 1896, H.R. DOC. NO. 54-8, at 261 (1897); *History of "In God We Trust,"* U.S. DEP'T OF THE TREASURY, <http://www.treasury.gov/about/education/pages/in-god-we-trust.aspx>.

APPENDIX C.
LETTER FROM PRESIDENT THEODORE ROOSEVELT.³¹⁶

When the question of the new coinage came up we looked into the law and found there was no warrant therein for putting “In God We Trust” on the coins. As the custom, although without legal warrant, had grown up, however, I might have felt at liberty to keep the inscription had I approved of its being on the coinage. But as I did not approve of it I did not direct that it should again be put on. Of course the matter of the law is absolutely in the hands of Congress, and any direction of the Congress in the matter will be immediately obeyed. At present, as I have said, there is no warrant in law for the inscription.

My own feeling in the matter is due to my very firm conviction that to put such a motto on coins, or to use it in any kindred manner, not only does no good, but does positive harm, and is in effect irreverence, which comes dangerously close to sacrilege. A beautiful and solemn sentence such as the one in question should be treated and uttered only with that fine reverence which necessarily implies a certain exaltation of spirit.

Any use which tends to cheapen it, and, above all, any use which tends to secure its being treated in a spirit of levity, is from every standpoint profoundly to be regretted. It is a motto which is, indeed, well to have inscribed on our great National monuments, in our temples of justice, in our legislative halls, and in buildings such as those at West Point and Annapolis – in short, wherever it will tend to arouse and inspire a lofty emotion in those who look thereon.

But it seems to me eminently unwise to cheapen such a motto by use on coins, just as it would be to cheapen it by use on postage stamps or in advertisements. As regards its use on the coinage, we have actual experience by which to go. In all my life I have never heard any human being speak reverently of this motto on the coins or show any signs of its having appealed to any high emotion in him, but I have literally, hundreds of times heard it used as an occasion of an incitement to the sneering ridicule which is, above all things, undesirable that so beautiful and exalted a phrase should excite.

For example, throughout the long contest extending over several decades on the free coinage question, the existence of this motto on the coins was a constant source of jest and ridicule, and this was unavoidable. Every one must remember the innumerable cartoons and articles based on phrases like “In God we trust for the 8 cents,” “In God we trust for the short weight,” “In God we trust for the 37 cents we do not pay,” and so forth and so forth.

³¹⁶ *Roosevelt Dropped ‘In God We Trust’: President Says Such a Motto on Coin Is Irreverence, Close to Sacrilege*, N.Y. TIMES, Nov. 14, 1907, at 1, <http://query.nytimes.com/mem/archive-free/pdf?res=9406E2D8103EE033A25757C1A9679D946697D6CF>.

Surely, I am well within bounds when I say that a use of the phrase which invites constant levity of this type is most undesirable. If Congress alters the law and directs me to replace on the coins the sentence in question, the direction will be immediately put into effect, but I very earnestly trust that the religious sentiment of the country, the spirit of reverence in the country, will prevent any such action being taken.

Theodore Roosevelt

